able application of the political question doctrine necessitates this Court's clarification.

I.
LOWER COURTS NEED GUIDANCE FROM THE SUPREME COURT BECAUSE THEY APPLY THE POLITICAL QUESTION DOCTRINE INCONSISTENTLY

The courts have displayed confusion over the proper application of the political question doctrine and are inconsistent in determining the justiciability of violations of individual rights when these claims implicate Executive power. Petitioners' case is both an example of this confusion and an ideal vehicle for its resolution, allowing this Court to revisit the clarity and intelligibility of the *Baker* factors. Pet. App. 1a-23a.

A. Some Lower Courts Apply the Political Question Doctrine in a Manner That Conflicts With the Judiciary's Long-Standing Protection of Individual Rights

The Judiciary traditionally protects individual rights, even when cases touch upon foreign relations or other political affairs. *See Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (noting that "judges should not reflexively invoke [the political question doctrine] to avoid difficult and somewhat sensitive decisions in the context of human rights"); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 67 (E.D.N.Y. 2005) (stating, "Since *Baker*, the Court has generally refused to hold that an individual's claims of personal injury present nonjusticiable political questions"); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 347-48 (S.D.N.Y. 2003) (finding tort claims for human rights violations justiciable under the Alien Tort Claims Act).

See also Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 471 (S.D. Fla. 1980) (recognizing that "the pervasive influence of the political question doctrine in fields touching on foreign affairs has not led courts to surrender their power to protect individuals against government action"); Fritz W. Sharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517, 584 (1966) (observing that courts are hesitant to invoke the political question doctrine "where important individual rights are at stake"). These authorities demonstrate the Judiciary's commitment to the protection of individual rights when faced with an Executive branch assertion that the political question doctrine should apply.

Some courts, however, have found nonjusticiable political questions when plaintiffs allege violations of individual rights. *See Schneider v. Kissinger*, Pet. App. 15a (finding a nonjusticiable political question when plaintiffs asserted domestic tort claims and violations of international law), *Aktepe v. United States*, 105 F.3d 1400, 1403-04 (11th Cir. 1997) (declaring that claims of wrongful death and personal injury involved political questions that are best left to other branches of government); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1195-99 (C.D. Cal. 2002) (stating that claims alleging environmental torts, racial discrimination, war crimes, and crimes against humanity raised a nonjusticiable political question).

The divergent determinations of justiciability in cases involving individual rights demonstrate confusion within the courts. Lower courts require guidance from this Court to reconcile the political question doctrine with the concern for protecting individual rights.

B. The Lower Courts Reach Different Conclusions About Justiciability When Confronted With Similar Facts

When deciding whether the political question doctrine applies, lower courts frequently arrive at different conclusions despite factual similarities. *Compare Campbell v. Clinton*, 203 F.3d 19, 37-41 (D.C. Cir. 2000) (Tatel, J., concurring) (arguing that a case challenging U.S. involvement in an air campaign in Yugoslavia did not pose a political question); *Berk v. Laird*, 429 F.2d 302, 306 (2d Cir. 1970) (holding that a challenge to the Vietnam War did not necessarily raise a political question); *with Campbell*, 203 F.3d at 24-28 (Silberman, J., concurring) (stating that courts cannot adjudicate national security cases because no judicial standards exist); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309-11 (2d Cir. 1973); (deciding that a case challenging hostilities in Cambodia raised a political question); *Ange v. Bush*, 752 F. Supp. 509, 512 (D.D.C. 1990) (declining to review a challenge to the Persian Gulf War because it represented a political question).

The lower courts have two distinct approaches to the application of the political question doctrine when confronted with factually similar cases that touch upon foreign affairs. The first holds that courts should resolve tort, property, or international law claims for human rights violations that do not intrude upon the role of the political branches. The competing view holds that tort or international law claims for violations of human rights are incapable of resolution without usurping the Executive branch's role in foreign policy determinations. *Compare Alperin v. Vatican Bank*, 410 F.3d 532, 548 (9th Cir. 2005) (ruling that "claims for conversion, unjust enrichment, restitution, and an accounting with respect

to lost and looted property are not committed to the political branches"); *Kadic*, 70 F.3d at 249 (noting that "[t]he department to whom this issue [adjudicating violations of humanitarian law] has been 'constitutionally committed' is none other than our own – the Judiciary") (quotation marks and internal citations omitted); *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (holding that the narrow tort claims of an American citizen tortured and killed during the Nicaraguan civil war were justiciable); *with Schneider v. Kissinger*, Pet. App. 8a (ruling that foreign policy decision-making is solely within the realm of the political branches of government), *Aktepe*, 105 F.3d at 1403 (concluding that the plaintiffs' wrongful death and personal injury claims were nonjusticiable because they implicated foreign affairs). The political question doctrine should be clarified to prevent ambiguities and ensure consistency in factually similar cases.

The disagreement and confusion within a single panel of the D.C. Circuit in *Tel-Oren v. Libyan Arab Republic* demonstrates the difficulties posed by the political question doctrine. 726 F.2d 774 (D.C. Cir. 1984). Judge Edwards' opinion stated that the political question doctrine is limited and that not all questions involving foreign affairs require its invocation. *See id.* at 796-97 (Edwards, J., concurring). Judge Bork's opinion, on the other hand, revealed that he would apply the political question doctrine if it were more clearly defined. *See id.* at 803, n. 8 (Bork, J., concurring) (stating, "If it were necessary, I might well hold that the political question doctrine bars this lawsuit," but noting that "the contours of this doctrine are murky and unsettled" due to the lack of consensus among members of the Supreme Court and scholars) (internal citations omitted). In the third

opinion, Senior Judge Robb argued that the political question doctrine warranted dismissal of the case. *Id.* at 823 (Robb, S.J., concurring) (arguing that "[f]ederal courts are not in a position to determine the international status of terrorist acts"). These diverse viewpoints within a single judicial decision exemplify the inconsistencies inherent to the political question doctrine and demonstrate a need for this Court's clarification.

C. Some Lower Courts Avoid the Political Question Doctrine When Determining Justiciability

The political question doctrine does not provide courts with adequate guidance to decide cases involving Executive action, which come before the courts with increasing frequency. Lower courts acknowledge the disarray of the political question doctrine and in some cases refuse to determine justiciability based on the doctrine. *See Alperin*, 410 F.3d at 546 (stating that "[t]he cases break down into several categories: finding of justiciability, finding of no justiciability, and skirting the political question doctrine or not reaching the doctrine"). When courts apply the doctrine, they place varying degrees of emphasis on particular *Baker* factors, leading to inconsistent and arbitrary results.[3] This Court

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[3]This Court has acknowledged that differing weight might be given to particular *Baker* factors. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (stating that the *Baker* factors "are probably listed in descending order of both importance and certainty"). The implication that certain *Baker* factors might no longer be viable is borne out by the disproportionate emphasis on the first two formulations in both Supreme Court and lower court cases. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 518-49 (1969) (extensively discussing the first *Baker* factor, while dismissing the other factors after a brief analysis); *see also El-Shifa Pharm. Indus.*

[footnote continued]

should clarify the doctrine to assure its proper use and application.

The indeterminate boundaries of the political question doctrine has led some courts to use alternative grounds to determine justiciability. For example, courts have reached different results when determining the justiciability of the power to declare war. *Compare Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (classifying war powers as largely immune from judicial inquiry); *Lowry v. Reagan*, 676 F. Supp. 333, 337 (D.D.C. 1987) (deciding not to review whether U.S. troops were engaged in "hostilities" in the Persian Gulf); *with Doe v. Bush*, 323 F.3d 133, 135 (1st Cir. 2003) (confronting the scope of Executive war powers in a military offensive against Iraq). In *Doe v. Bush*, the court referred to the political question doctrine as "murky" and "confusing" and declined to apply the doctrine. 323 F.3d at 139-40. The *Doe* court's refusal to consider the political question doctrine where other courts certainly would demonstrates the disordered state of the doctrine.

Other courts have noted the poorly defined contours of the political question doctrine. *See In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d at 64-65 (observing that the political question doctrine is "not

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Co. v. United States, 378 F.3d 1346, 1362-67 (Fed. Cir. 2004) (emphasizing the first *Baker* factor); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1312-19 (11th Cir. 2001) (briefly addressing "prudential considerations" after analyzing the first and second *Baker* formulations at length); *In re African-American Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1056-63 (N.D. Ill. 2004) (discussing extensively the first and second *Baker* factors). Courts, however, are by no means unanimous in emphasizing the first two factors, leading to inconsistency in application of the doctrine. *See Campbell*, 203 F.3d at 24-28.

altogether clear" and that experts have questioned its usefulness and validity); *González-Vera v. Kissinger*, No. 02-02240, slip. op. at 7-8 (D.D.C. Sept. 17, 2004) (declining to apply the "ill-defined and nebulous political question doctrine"); *Haitian Refugee Center, Inc. v. Baker*, 789 F. Supp. 1552, 1565-66 (S.D. Fla. 1991) (noting that the "murky and unsettled" political question doctrine did not bar adjudication of plaintiffs' claims under international law and the Constitution) (internal citations omitted).

Case law demonstrates that the courts need clarification of the political question doctrine. In the interest of maintaining effective judicial review, this Court should revisit the political question doctrine and provide the lower courts with the clarity and guidance they require.

II.
THIS INCONSISTENT APPLICATION OF THE POLITICAL QUESTION DOCTRINE CONFLICTS WITH ANGLO-AMERICAN LEGAL TRADITIONS AND THE JUDICIARY'S COMMITMENT TO PROTECTION AND ADJUDICATION OF INDIVIDUAL RIGHTS

The legal history of the United States, from its foundation in English law to the formation of the Constitution, and current U.S. jurisprudence demonstrate a commitment to the protection of individual rights. The Constitution provides Article III courts with the power to adjudicate claims involving violations of individual rights. The political question doctrine, if used to exempt review of violations of individual rights, places the Executive branch above the law.

A. Protection of Individual Rights Is Derived From Principles of Early English Law

Contemporary Anglo-American jurisprudence is grounded in early English law. From its roots in the *Magna Carta,* English law has consistently reiterated that one of the fundamental purposes of law is the protection of individual rights. *See* William Blackstone, 1 *Commentaries on the Laws of England* 120 (The University of Chicago Press 1979) (noting that "the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals") (emphasis in original). The *Magna Carta* established the importance of the rule of law in the protection of individual rights, stating that "[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." *Magna Carta* ch. 39 (A.E. Dick Howard ed., University Press of Virginia 1998) (1215). The King was subjected to the rule of law under the *Magna Carta,* which restrained his absolute sovereign power. This check on Executive power influenced the U.S. Constitution's division of powers among the branches of government.

B. The U.S. Constitution Reflects the Fundamental Importance of Protection of Individual Rights and Separation of Powers

The founders of the American system of government carefully provided for protection of individual rights and separation of governmental powers. *The Federalist Papers* illustrate the founders' profound respect for both the doctrine of separation of powers and the

doctrine of checks and balances. "The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." *The Federalist* No. 47 (James Madison).

The framers established a government based on both separation of powers and checks and balances with the goal of preventing a return to the abusive, arbitrary Executive power from which they had recently freed themselves. It is within this context that the United States Constitution was formed, which states, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, §2. Article III courts have the power and duty to adjudicate violations of individual harms, even when Executive branch officials are implicated, to prevent the concentration of power within one branch of government.

C. U.S. Jurisprudence Demonstrates a Commitment to Protection of Individual Rights and Separation of Powers

This Court has a long history of protecting violations of individual rights. *Marbury v. Madison* recognized the importance of individual rights and the duty of courts to adjudicate harms to individuals. 5 U.S. (1 Cranch) 137, 163 (1803). *Marbury* held that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* Individuals require not only adjudication, but proper redress for their claims because

"every right, when withheld, must have a remedy, and every injury its proper redress." *Id.* Although *Marbury* noted that certain "political act[s]" were not the proper subject of adjudication, these acts did not include violations of "individual rights." *Id.* at 164, 166.

This Court's precedent recognizes the boundaries of the individual branches of government while maintaining its authority and responsibility to adjudicate cases and controversies. *See Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985) (declining to grant executive officers absolute immunity because "[t]he danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity"); *Harlow v. Fitzgerald*, 457 U.S. 800, 807-08 (1982) (discussing the Court's ability to determine the scope of immunity of Executive Branch officials, which is not barred by separation of powers); *Nixon v. Fitzgerald*, 457 U.S. 731, 753-54 (1982) (recognizing that "the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States"). Concern for separation of powers does not preclude courts from hearing cases involving individual rights.

Although this Court has cautioned that certain issues are beyond judicial cognizance due to their political nature, it has also recognized the application of "a discriminating analysis of the particular question posed" to determine "its susceptibility to judicial handling." *Baker v. Carr*, 369 U.S. 186, 211-12 (1962). Too often, however, analysis by the lower courts is not "case-specific," resulting in an uncritical abdication of Article III authority. When courts fail to apply a discriminating analysis and defer to the Executive's judgment, they permit

the Executive to define which of its actions are subject to judicial scrutiny. *See also Gutierrez v. Lamagno*, 515 U.S. 417, 428-9 (1995) (stating, "No man is allowed to be a judge in his own cause . . . . With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time") (internal citations omitted).

In *Hamdi v. Rumsfeld* and *Rasul v. Bush*, the Executive challenged the Judiciary's authority to examine the conduct of the Executive when faced with national security concerns. 542 U.S. 507, 516-519 (2004); 542 U.S. 466, 470-473 (2004). In both cases, which involved the Executive's power to detain so-called enemy combatants indefinitely without the right to counsel or judicial oversight of the terms of the confinement, the Executive sought to exempt its conduct from judicial review based on national security concerns over the "war on terror." *Id.* This Court acknowledged that military decisions are a function of the Executive branch, but recognized that "the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government." *Hamdi*, 542 U.S. at 535-36 (emphasis in original).

This Court can and should articulate consistent and intelligible principles of accountability, even if the Executive or Legislative branch might wish a different result. *See id.* at 532-33 (declining to adopt the "Government's proposed rule" regarding detainees and emphasizing the importance of procedural due process); *Powell v. McCormack*, 395 U.S. 486, 549 (1969) (stating, "Our system of government requires that federal

courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952) (finding that the President exceeded the boundaries of his constitutional powers by placing steel mills under federal control). As Justice Brandeis stated in *Myers v. United States*, "The doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

III.

THE MANNER IN WHICH SOME LOWER COURTS APPLY THE POLITICAL QUESTION DOCTRINE HOLDS FOREIGN OFFICIALS ACCOUNTABLE FOR VIOLATIONS OF INTERNATIONAL LAW WHILE EXEMPTING U.S. OFFICIALS, WHICH RESULTS IN ISOLATION FROM THE GLOBAL COMMUNITY

Inconsistent application of the political question doctrine conflicts with the courts' traditional protection of individual rights under internationally recognized standards of customary law. The failure of some courts to protect these rights creates an uncertain outcome for foreign citizens who seek justice within the U.S. legal system. One court may recognize international law to provide remedies for torts brought by foreign nationals against a foreign official, while another court may use the political question doctrine to block tort claims—

brought by foreign nationals against a U.S. government official. This inconsistency sets the United States apart from the global community as a country where individual rights are only selectively protected.

A. U.S. Courts Formally Recognize Protections of Individual Rights Shared by the Global Community

U.S. courts have historically looked to standards of international law and the jurisprudence of foreign nations to strengthen protections of individual rights. *See Roper v. Simmons*, 125 S.Ct. 1183, 1198 (2005) (considering "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty"); *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003) (referring to decisions by the European Court of Human Rights and actions of other countries to protect the rights of homosexual adults to engage in "intimate, consensual conduct"); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (finding that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved") (internal citations omitted); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 429, n.27, n.28, n.29 (1964) (citing international and arbitral decisions to determine the limitations on a state's power to expropriate a foreign citizen's property); *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (noting that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime").

This Court and other federal courts have also recognized that international customary law, or the law of

nations, is a part of the law of the United States. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) (providing that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction"). In *Filártiga v. Peña-Irala*, the Second Circuit recognized private causes of action under the Alien Tort Claims Act (ATCA) for violations of international customary law. 630 F.2d 876, 885 (2d Cir. 1980) (finding that "the law of nations . . . has always been part of the federal common law"). Recently, this Court affirmed that international customary law provided substantive rights and duties in *Sosa v. Alvarez-Machain*, holding that certain torts, which violate international customary law, are actionable under the ATCA. 542 U.S. 692, 714 (2004).

With the ATCA, Congress provided a legal avenue for foreign claimants who have suffered violations of international law and demonstrated the United States' commitment to upholding and protecting individual rights throughout the world.[4] This commitment is threatened

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[4] *See* Sandra Coliver et al., *Holding Human Rights Violators Accountable By Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 Emory Int'l L. Rev. 169, 174-75 (2005) (observing that "ATS litigation of the past twenty years has accomplished a number of important objectives and has laid the foundation for further development of this civil anti-impunity tool for human rights victims in the United States and possibly in other countries. As we see it, these lawsuits have contributed to the worldwide movement against impunity by (1) helping to ensure that the United States does not remain a safe haven for such perpetrators, (2) holding individual perpetrators accountable for human rights abuses, (3) providing the victims with some sense of official acknowledgment and reparation, (4) contributing to the development of international human rights law, and (5) building a constituency in the United States that

[footnote continued]

when lower courts apply the political question doctrine in a manner that prevents the adjudication of violations of individual rights. As amicus curiae in *Filártiga*, the United States emphasized that when a violation of customary international law is alleged, "there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." *See* Memorandum for the United States as Amicus Curiae, *Filártiga v. Peña Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), *reprinted in* 19 I.L.M. 585, 604 (1980).

B. Inconsistent Use of the Political Question Doctrine Creates Uncertainty in Tort Actions Brought by Foreign Nationals

Some federal courts have demonstrated a willingness to adjudicate claims that touch upon foreign relations when the claims are brought by foreign claimants against foreign officials. In these cases, courts have found judicially manageable standards in domestic and international customary law to protect individual rights. *See Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (finding that the ATCA gave federal courts the ability to "fashion domestic common law remedies to give effect

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supports the application of international law in such cases and an awareness about human rights violations in countries in all regions of the world. It also appears that these cases, when taken together with other anti-impunity efforts around the world, are also helping to (6) create a climate of deterrence and (7) catalyze efforts in several countries to prosecute their own human rights abusers").

to violations of customary international law"); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (cautioning that judges should not "reflexively invoke doctrines" such as the political question doctrine "to avoid difficult and somewhat sensitive decisions in the context of human rights"); *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988) (ruling that "[b]ribetaking, theft, embezzlement, extortion, fraud, and conspiracy to do these things are all acts susceptible of concrete proofs that need not involve political questions").

Despite this willingness to provide remedies to foreign claimants in cases brought against foreign officials, some courts have declined to hear claims that allege violations of international law by U.S. governmental officials. *See Schneider v. Kissinger*, Pet. App. 8a-15a (finding a nonjusticiable political question despite the existence of domestic and international customary law standards for evaluating plaintiffs' claims); *Antolok v. United States*, 873 F.2d 369, 379-80 (D.C. Cir. 1958) (refusing to consider standards for adjudicating a case involving tort claims arising from nuclear bomb tests carried out by the U.S. government because of the presence of foreign relations issues).

Current application of the political question doctrine creates an uncertain environment for foreign claimants in a country that deems itself the global champion of human rights. Some courts continue to selectively apply the political question doctrine to block adjudication of claims involving violations of individual rights under international law. As the global community continues to place value on protecting and upholding human rights, contradiction within the U.S. courts becomes increasingly contrary to international norms.

Without clarification from this Court, the lower courts' application of the political question doctrine will continue to result in inconsistent protection of individual rights.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the Court should grant this petition.

Respectfully submitted,

MICHAEL E. TIGAR
(Counsel of Record)
4801 Massachusetts Ave., N.W.
Suite 206 C
Washington, D.C. 20016
(202) 274-4088
Attorney for Petitioners.

December 8, 2005

APPENDIX A

[Filed June 28, 2005]

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5199

RENÉ SCHNEIDER, *et al.*,

Appellants,

v.

HENRY ALFRED KISSINGER and
UNITED STATES OF AMERICA,

Appellees.

Argued March 11, 2005

Decided June 28, 2005

Appeal from the United States District Court for the District of Columbia (No. 01cv01902).

Laura Rotolo, student counsel, argued the cause appellants. With her on the briefs were Michael E. Tigar, and Alison Stites, Christine Parsadaian, Courtney J. Nogar, Debra L. Spinelli-Hays, James B. Cowden, Karen Corrie, Melissa Mandor, Timothy L. Foden, Jennifer Dodenhoff, and Aaron Lloyd, student counsel.

Robert M. Loeb, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were Daniel Meron, Acting Assistant Attorney General, Kenneth L. Wainstain, U.S. Attorney, and Barbara L. Herwig, Assistant Director.

Before: SENTELLE, HENDERSON and ROGERS, Circuit Judges.

SENTELLE, Circuit Judge.

René and Raúl Schneider, surviving sons of deceased Chilean General René Schneider, together with José Pertierra, personal representative of the estate of General Schneider, brought this action in United States District Court for the District of Columbia against the United States and Henry Kissinger, who at the time of the relevant events was the National Security Advisor to the President of the United States. The complaint alleged in nine counts, all of them directed against both defendants, that Kissinger and the United States had caused, in conjunction with Chilean persons not named as defendants, the kidnapping, torture, and death of Plaintiffs-Appellants' decedent. The District Court granted the motion of Defendants-Appellees to dismiss Appellants' complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for lack of jurisdiction and failure to state a claim upon which relief could be granted. Plaintiffs filed this appeal. Because we agree with the District Court that the courts lack jurisdiction over nonjusticiable questions raised by the complaint, we affirm the grant of dismissal pursuant to Rule 12(b)(1).

I. Background

Appellants filed their original complaint on September 10, 2001, identifying their relationship to the deceased general and claiming against Kissinger, the United States, and Richard Helms (former Director of the CIA). That complaint alleged that in 1970 the leader of the Chilean leftist coalition, Dr. Salvador Allende, won a slight plurality of the vote (36.3%) in Chile's presidential election, and that this victory on his part created the expectation that he would, in the following months, be ratified by the Chilean congress as the first socialist president of the country. According to the complaint, "[k]ey United States policymakers" opposed the choice of Allende as president of Chile and on September 8, 1970, "policymakers" began the process of assessing "the pros and cons and problems and prospects involved should a Chilean military coup be organized . . . with U.S. assistance." Compl. ¶ 16, Appellee's Appendix (App.) at 7. After receiving further information, on September 15, 1970, defendants Kissinger, Helms, and Attorney General John Mitchell met with President Nixon. The President ordered that steps be taken to prevent Allende from becoming president, and specifically, that the CIA was to "play a direct role in organizing a military coup d'etat in Chile" and do quickly whatever was possible to prevent the seating of a possible socialist president. Compl. ¶ 18, App. at 8. The President expressed that he was "not concerned" about any risks involved, authorized $10 million in funds to effect such a coup, and required a plan of action be drafted within 48 hours. *Id.*

The complaint further alleged that efforts to prevent Allende from achieving the presidency proceeded on two tracks. "Track I" was a covert political, economic, and propaganda campaign approved by a subcabinet level

body of the executive established to exercise political control over covert operations abroad. Compl. ¶ 19, App. at 8. "Track II" activities were undertaken in direct response to the President's September 15 order and were directed "towards actively promoting and encouraging the Chilean military to move against Allende." *Id.* In the following months, the tracks moved together. The United States Ambassador to Chile was authorized to encourage a military coup and to intensify contacts with Chilean military officers in order to ascertain their willingness to support such a coup. The Ambassador was also authorized to make contacts in the Chilean military aware that the military would receive no military assistance from the United States if Allende became president of Chile. The Ambassador reported back that General Schneider would be an impediment to achieving the goals outlined in the President's directive, and that he would have to be neutralized. The complaint went on to allege particular acts undertaken in furtherance of the goal of establishing a military coup and claims for relief based on those actions, including the kidnapping, torture, and killing of General Schneider. In all, the complaint alleged seven claims: (1) summary execution; (2) torture; (3) cruel, inhumane, or degrading treatment; (4) arbitrary detention; (5) wrongful death; (6) assault and battery; and (7) intentional infliction of emotional distress.

Defendants moved to dismiss the complaint on November 9, 2001; Plaintiffs responded on December 17, and Defendants replied on January 31, 2002. Also, in November, the Attorney General submitted a certification that Kissinger and Helms were acting within the scope of federal employment at the time of the incident out of which plaintiffs' claims arose. Based on that certification, the Attorney General asked the court to

remove the individual defendants from the case under the *Westfall* Act, 28 U.S.C. §2679, and substitute the United States. In response to the *Westfall* certification (and to Helms's October 2002 death), plaintiffs submitted an amended complaint on November 11, 2002. The amended complaint omitted the direct references to President Nixon, deleted the deceased Helms as a defendant, and added two new claims under the Federal Tort Claims Act, 28 U.S.C. §1346(b)(1), one for "negligent failure to prevent summary execution, arbitrary detention, cruel, inhumane, or degrading treatment, torture, wrongful death, and assault and battery," and one for intentional infliction of emotional distress. Am. Compl. ¶¶87-100, App. at 22-24. Defendants renewed their motion to dismiss on December 12, 2002. Plaintiffs responded to the motion on January 17, 2003. On March 30, 2004, the court granted the motion to dismiss pursuant to Rule 12(b)(1) on the basis that the Political Question Doctrine rendered plaintiffs' claims nonjusticiable. *Schneider v. Kissinger,* 310 F.Supp.2d. 251, 257-64 (D.D.C.2004) (applying *Baker v. Carr,* 369 U.S. 186, 210, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). In the alternative, the court held that the complaint failed under Rule 12(b)(6) because (1) Kissinger was immune under the *Westfall* Act, *Schneider,* 310 F.Supp.2d. at 264-67, and (2) the United States was immune as sovereign, *id.* at 268-70. The court noted early in its decision that it would rely on *both* the original and amended complaints in making its decision, because "[t]he parties ask the Court to consider all briefs, as they did not repeat their initial arguments in response to the amended complaint." *Id.* at 254 nn. 2-3.

Because we determine that the court correctly ruled that it lacked jurisdiction as a result of the application of the political question doctrine, we need not reach the

alternate ground. We note in passing that some of the discussion of sovereign immunity and *Westfall* questions bears on our application of the Political Question Doctrine, but we need make no determination of the questions raised by those theories in light of the jurisdictional question that is determinative.

II. The Political Question Doctrine

The principle that the courts lack jurisdiction over political decisions that are by their nature "committed to the political branches to the exclusion of the judiciary" is as old as the fundamental principle of judicial review. *Antolok v. United States*, 873 F.2d 369, 379 (D.C.Cir.1989) (separate opinion of Sentelle, J.). In the venerable case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), Chief Justice Marshall first expressed the recognition by the judiciary of the existence of a class of cases constituting "political act[s], belonging to the executive department alone, for the performance of which entire confidence is placed by our Constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy." *Id.* at 164. In a continuing line beginning with Chief Justice Marshall's analysis in *Marbury v. Madison*, this doctrine has evolved as a limitation of the jurisdiction of the courts particularly applicable to foreign relations. *See Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302-03, 38 S.Ct. 309, 63 L.Ed. 726 (1918). Chief Justice Marshall, writing again in *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 4 L.Ed. 471 (1818), described questions of foreign policy as "belong[ing] more properly to those . . . who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; *to whom are entrusted all its foreign rela-*

tions; then to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it." *Id.* at 634 (emphasis added).

Contemporary application of the Political Question Doctrine, as recognized by the District Court, draws on the analysis set forth in *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The *Baker* Court first recognized that "the political question doctrine is 'primarily a function of the separation of powers.' " *Schneider v. Kissinger,* 310 F.Supp.2d at 258 (quoting *Baker,* 369 U.S. at 210, 82 S.Ct. 691). In *Baker,* the Supreme Court enumerated six factors that may render a case nonjusticiable under the Political Question Doctrine:

> Prominent on the surface of any case held to involve a political question is found a [1] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment of multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217, 82 S.Ct 691. The *Baker* analysis lists the six factors in the disjunctive, not the conjunctive. To find a political question, we need only conclude that one factor is present, not all. Nonetheless, we note that most of the factors counsel against the exercise of

jurisdiction over the controversy that Plaintiff-Appellants bring to the court.

1. *Textually demonstrable constitutional commitment to other branches*

First, the lawsuit raises policy questions that are textually committed to a coordinate branch of government. As the Supreme Court suggested in *Marbury* and made clear in later cases, "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative – 'the political' – Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen*, 246 U.S. at 302, 38 S.Ct. 309. Otherwise put, "foreign policy decisions are the subject of just such a textual commitment," as contemplated in *Baker v. Carr. Comm. of United States Citizens v. Reagan*, 859 F.2d 929, 933-34 (D.C.Cir.1988).

Absent precedent, there could still be no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches of government. Article I, Section 8 of the Constitution provides an enumeration of powers of the legislature. That article is richly laden with delegation of foreign policy and national security powers. Direct allocation of such power is found in Section 8, Clause 1, "the Congress shall have the Power To . . . provide for the Common Defence . . ."; Clause 3, "To regulate commerce with foreign nations"; Clause 10, "To define and punish Piracies and Felonies committed on the High Seas and Offenses against the Law of Nations"; Clause 11, "To declare War, grant Letters of Marque and Reprisal, and

make Rules concerning Captures on Land and Water"; Clause 12, "To raise and support Armies . . ."; Clause 13, "To provide and maintain a Navy"; Clause 14, "to make Rules for the Government and Regulation of the land and naval Forces"; Clause 15, "To provide for calling forth the Militia to . . . repel Invasions"; Clause 16, "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."

In addition to these direct allocations to the Congress of these foreign relations and national security powers, other sections and clauses of Article I bear on the subject to provide further weight to the conclusion of contextual allocation. For example, Section 9 of Article I provides for the suspension of the writ of habeas corpus "when in cases of . . . invasion the public safety may require it." Section 10 allocates to the Congress the authority to provide consent to individual states, without which they may not "ener into any Agreement or Compact with . . . a foreign Power, or engage in War . . . ." This not to mention the perhaps less direct but undeniably real connection between national security and other powers of Congress, such as that under Article I, Section 8, Clause 1, to "lay and collect Taxes," and Clause 2, to "borrow money on the credit of the United States."

Just as Article I of the Constitution evinces a clear textual allocation to the legislative branch, Article II likewise provides allocation of foreign relations and national security powers to the President, the unitary chief executive. Article II, Section 2 provides, *inter alia*, that "the President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ." That same section further provides

that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, . . . [and to] appoint Ambassadors, other public Ministers and Consuls." Section 3 of Article II provides that "he shall receive Ambassadors and other public Ministers . . . and shall Commission all the Officers of the United States," including obviously the officers of the military.

While the language of textual commitment of the President is not as extensive as that relating to the legislative branch, nonetheless it is plain that that commitment is real. Indeed, the Supreme Court has described the President as possessing "plenary and exclusive power" in the international arena and "as the sole organ of the federal government in the field of international relations . . . ." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936).

By contrast, in Article III defining the judicial power of the United States the closest there is to a reference to foreign relations is the extension of jurisdiction to "Cases affecting Ambassadors, other public Ministers and Consuls." U.S. Const., Art. III, §1. Obviously all this provides is jurisdiction for adjudication of cases against those officers. It provides no authority for policymaking in the realm of foreign relations or provision of national security. It cannot then be denied that decision-making in the areas of foreign policy and national security is textually committed to the political branches.

Neither can it be gainsaid that the subject matter of the instant case involves the foreign policy decisions of the United States. In 1970, at the height of the Cold War, officials, of the executive branch, performing their delegated functions concerning national security and

foreign relations, determined that it was in the best interest of the United States to take such steps as they deemed necessary to prevent the establishment of a government in a Western Hemisphere nation that in the view of those officials could lead to the establishment or spread of communism as a governing force in the Americas. This decision may have been unwise, or it may have been wise. The political branches may have since rejected the approach, or not. In any event, that decision was classically within the province of the political branches, not the courts. As the Supreme Court has repeatedly reminded us, "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Ceteacean Soc'y*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed2d 166 (1986). This is so because "[t]he Judiciary is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.' " *Id.* (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C.Cir.1981)).

2. *No judicially discoverable and manageable standards*

The second criterion of the *Baker* six brings under the nonjusticiable umbrella of political question any case as to which there is "a lack of judicially discoverable and manageable standards for resolving it." 369 U.S. at 217, 82 S.Ct. 691. This factor, even taken apart from the first factor, supports the District Court's conclusion that this case must be dismissed under Rule 12(b)(1). As the District Court well understood, for a court to adjudicate

this case would be for that court to undertake the determination of whether, 35 years ago, at the height of the Cold War between the United States and the western powers on the one hand and the expanding communist empire on the other, "it was proper for an Executive Branch official . . . to support covert actions against" a committed Marxist who was set to take power in a Latin American country. *Schneider*, 310 F.Supp.2d at 261-62. Unlike the executive, the judiciary has no covert agents, no intelligence sources, and no policy advisors. The courts are therefore ill-suited to displace the political branches in such decision-making.

As we have said before of other security considerations in another context, "it is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role." *Center for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 932 (D.C.Cir.2003).

Appellants claim that the District Court erred in holding that no standards exist for determining whether "it was proper for an Executive Branch official . . . to support covert actions against an undesirable figure who was set to take power in a foreign nation." *Schneider*, 310 F.Supp.2d at 261-62. They assert that the District Court "misconstrued Plaintiffs' claims by framing the issue as an attack on policy." Appellants' Br. at 14. However, it is not at all clear to us why Appellants believe their suit to be anything other than such an attack. They claim that "the D.C. Circuit has held that courts should not invoke the political question doctrine to avoid adjudication of a violation of basic rights." *Id.* However, the only case from this court which they offer for that proposition is *Ramirez de Arellano v. Weinberger*, 745

F.2d 1500 (D.C.Cir. 1984). In fact, that case stands for nothing at all, as it was vacated by the Supreme Court in *Weinberger v. Ramirez de Arellano,* 471 U.S. 1113, 105 S.Ct. 2353, 86 L.Ed.2d 255 (1985). After the remand, this Court reversed and sent the case back to the District Court for dismissal, with no reinstatement of the original opinion ever occurring. *See Ramirez De Arellano v. Weinberger,* 788 F.2d 762 (D.C.Cir.1986).

In the District Court, though not expressly before us, Appellants had urged that " 'the standards for evaluating wrongful death are well established. . . . and that the 'Court need not depart from these in managing the instant action.' " *Schneider,* 310 F.Supp.2d at 261. We agree with the District Court that this formulation of the issues is no help. As the District Court stated, "[r]esolving the present lawsuit would compel the court, at a minimum, to determine whether actions or omissions by an Executive Branch officer in the area of foreign relations and national security were 'wrongful' under tort law." *Id.* at 262. We agree with the District Court and the Eleventh Circuit in *Aktepe v. United States,* 105 F.3d 1400, 1404 (11th Cir.1977), that recasting foreign policy and national security questions in tort terms does not provide standards for making or reviewing foreign policy judgments. In *Aktepe,* the Eleventh Circuit considered a case brought by Turkish sailors alleging injuries and wrongful death suffered as a result of missiles fired by a United States Navy vessel during North Atlantic Treaty Organization training exercises. In holding that the action was barred, *inter alia,* by the second *Baker* political question factor, that Circuit noted that "in order to determine whether the Navy conducted the missile-firing drill in a negligent manner, a court would have to determine how a reasonable military force would have con-

ducted the drill." *Id.* The *Aktepe* court went on to observe "[a]s the Supreme Court noted in a related context, 'it is difficult to conceive of an area of governmental activity in which the courts have less competence.' " *Id.* (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973)). Similarly here, in order to determine whether the covert operations which allegedly led to the tragic death of General Schneider were wrongful, the court would have to define the standard for the government's use of covert operations in conjunction with political turmoil in another country. There are no justiciably discoverable and manageable standards for the resolution of such a claim.

3. *Judicial resolution would require an initial policy determination of a kind clearly for nonjudicial discretion*

Without rehashing the constitutional separation of powers concerns raised by the two *Baker* factors already discussed, we note that the same sort of problems raise the third factor as well. The District Court well stated the matter:

> [P]laintiffs contend that "the Court is not here asked to pass judgment on any perceived value or danger of the Allende government to United States interests and need not make any policy determination[.]" Pls.' Opp. I at 15. While the plaintiffs are correct that the Court might be able to avoid evaluating the merits of a potential Allende Government in 1970, it would nonetheless be forced to pass judgment on the means used by the United States to keep that government from taking power.

Schneider, 310 F.Supp.2d at 263. While we are not at all convinced that we would be able to avoid evaluating the merits of the potential Allende government in 1970,

we are completely in agreement with the District Court that we would be forced to pass judgment on the policy-based decision of the executive to use covert action to prevent that government from taking power. Allying United States intelligence operatives with dissidents in another country to kidnap a national of that country may be a drastic measure. To determine whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking. As the Supreme Court has emphasized, "the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court.' " *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 196, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983)).

Thus, we agree with the District Court that the third *Baker* factor also counsels against jurisdiction over this case.

4. *The court could not proceed without expressing a lack of respect to coordinate branches of government*

From what we have concluded as to the first three *Baker* factors, it seems apparent to us that we could not determine Appellants' claims without passing judgment on the decision of the executive branch to participate in the alleged covert operations-participation in which, we note from the record, has already been the subject of congressional investigation. We therefore affirm the conclusion of the District Court that "[a] court should refrain from entertaining a suit if it would be unable to do so without expressing a lack of respect due to its co-equal Branches of Government." 310 F.Supp.2d at 264

(citing *Baker v. Carr*, 369 U.S. at 217, 82 S.Ct. 691) (other citations omitted).

5. *Summary*

For the reasons set forth above, we conclude that at least the first four of the six *Baker* factors compel a determination that this case raises political questions committed to the political branches and therefore is beyond the jurisdiction of the courts. Appellants counter the government's political question arguments by asserting that this case does not fall within the Political Question Doctrine because "there is a difference between policy and the implementation of policy, and . . . the latter is within the realm of the judiciary to oversee." Appellants' Br. at 12. For this proposition, they cite *DKT Memorial Fund Ltd. v. Agency for Int'l Dev.*, 810 F.2d 1236 (D.C.Cir.1987), which stated, "whereas attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs." 810 F.2d at 1238.

Appellants are indeed correct that the *DKT Memorial* opinion so stated. However, it did so on a record immediately distinguishable from the controversy raised by the present litigation. *DKT Memorial* concerned not the executive's making of a policy decision and implementing that decision, but rather a challenge to the constitutionality of the manner in which an agency sought to implement an earlier policy pronouncement by the President. Indeed, after the jurisdictional decision in *DKT Memorial* had ordered the matter remanded to the District Court, the District Court's decision on remand came before this Court in a second appeal. We then made plain the narrowness of our original jurisdictional holding:

> In the present case, where the President acted under a congressional grant of discretion as broadly worded as any we are likely to see, and where the exercise of that discretion occurs in the area of foreign affairs, we cannot disturb his decision simply because some might find it unwise or because it differs from the policies pursued by previous administrations.

DKT Memorial Fund Ltd. v. Agency for Int'l Development, 887 F.2d 275, 281-82 (D.C.Cir.1989). Thus, our ultimate disposition of the *DKT Memorial* question supports rather than undermines the District Court's holding that the present case falls within the realm of nonjusticiable political questions first recognized in *Marbury v. Madison* and delineated in *Baker v. Carr.*

III. Other Issues

Appellants halfheartedly make an ill-formed argument that the actions of Defendant Kissinger in the Schneider/Allende matter were *ultra vires.* Apparently it is their contention that, as such, the entire Schneider/Allende matter therefore falls outside the Political Question Doctrine. They offer us a single sentence on the subject in their principal brief: "Plaintiffs maintain that Defendant Kissinger's actions were *ultra vires.*" Appellants' Br. at 12. This maintenance by plaintiffs is accompanied by a footnote citing *Linder v. Portocarrero,* 963 F.2d 332, 336 (11th Cir. 1992), for the proposition that " '[t]he [sic] complaint challenges neither the legitimacy of the United States foreign policy toward the contras, nor does it require the court to pronounce who was right and who was wrong in the Nicaraguan civil war,' but instead is 'narrowly focused on the lawfulness of the defendants' conduct in a single

incident.' " The footnote also includes two other cases, *Lamont v. Woods,* 948 F.2d 825, 833 (2d Cir.1991), and *Population Inst. v. McPherson,* 797 F.2d 1062, 1068-70 (D.C.Cir.1986), each of which, like our decision in *DKT Memorial, supra,* supports the proposition that foreign policy decisions are outside the jurisdiction of the courts by reason of the political question doctrine, but nonetheless permits adjudication of administrative matters arising out of the implementation of foreign policy. Not only do none of these cases support the proposition that we can adjudicate an entire line of foreign policy decisions, such as Appellants seek to bring to court in the present case, but Appellants have not further developed this argument for our adjudication.

In the District Court, as we noted above, Appellants' amended complaint struck the language of the original complaint alleging very specifically the personal involvement of the President of the United States. Apparently they now are attempting to argue that the acts of a foreign policy advisor are not foreign policy and therefore do not come within the Political Question Doctrine. In an attempt to further this strange maneuver, the amended complaint does include the words "*ultra vires*" in its second paragraph to the following effect:

> The documents show that the knowing practical assistance and encouragement provided by the United States and the official and *ultra vires* acts of Henry Kissinger resulted in General Schneider's summary execution, torture, cruel, inhuman and degrading treatment, arbitrary detention, assault and battery, negligence, intentional infliction of emotional stress, and wrongful death.

Am. Compl. ¶2, App. at 161. The *ultra vires* language raises its head again in the eighth claim for relief, which states that:

> Plaintiffs argue in the alternative and without waiving their *ultra vires* arguments, that at the time of the wrongful acts, Defendant Kissinger and other United States agents were employees of federal agencies, including the National Security Council and Central Intelligence Agency, and were acting within the scope of their office or employment.

Am. Compl. ¶90, App. at 181-82.

We understand the need of litigants at times to plead in the alternative and even to plead inconsistently in the alternative. Nonetheless, the language purporting not to waive *ultra vires* "arguments" does not help a complaint that never alleges a single claim for relief in *ultra vires* terms. Each of the claims for relief alleges acts by the Defendants which in the amended complaint consist only of the National Security Advisor and the United States. Their joint actions together can hardly be called anything other than foreign policy. It may be that Plaintiffs intended to allege some other cause of action which might have fallen outside the Political Question Doctrine, but this does not change the questions before us into others than we have discussed above.[1]

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[1] It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones. As we recently said in a closely analogous context: Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its argument squarely and distinctly, or else forever hold its peace.

United States v. Zannino, 895 F.2d 1, 17 (1st Cir.1990) (internal quotation marks omitted).

We caution that the lack of judicial authority to oversee the conduct of the executive branch in political matters does not leave the executive power unbounded. Granted, it is true, as Chief Justice Marshall recognized in *Marbury*, that "the injured individual has no remedy." *Marbury*, 5 U.S. (1 Cranch) at 164. Nonetheless, the nation has recompense, and the checks and balances of the Constitution have not failed. The political branches effectively exercise such checks and balances on each other in the area of political questions.

If the executive in fact has exceeded his appropriate role in the constitutional scheme, Congress enjoys a broad range of authorities with which to exercise restraint and balance. We catalogued above those authorities specifically related to international relations and national security, but as we also noted there, Congress wields the general power to lay and collect taxes and to borrow money on the credit of the United States. Without an appropriation from Congress to fund an undertaking, the President cannot conduct any such undertaking. *See Lichter v. United States*, 334 U.S. 742, 756, 68 S.Ct. 1294, 92 L.Ed. 1694 ("The constitutional power of Congress to support the armed forces with equipment and supplies is . . . clear and sweeping."). Indeed, Congress has used its appropriations power to draw limits upon the executive's activity in the area of foreign affairs. For example, in the *Boland* Amendment to the Department of Defense Appropriations Act, 1983, Pub.L. No. 97-377, § 793, 96 Stat. 1865 (1982), Congress proscribed the CIA from funding or participating in efforts to overthrow the Nicaraguan government. The *Boland* Amendment example is particularly striking in that elements of the executive branch apparently violated these congressional restraints. Thereafter, Congress exercised one of

its other powerful tools against executive overreaching: congressional oversight. The alleged breach of the *Boland* Amendment gave rise to the Iran/Contra proceedings, which in time gave rise to investigations by an Independent Counsel acting under authority conferred by Congress in the Ethics in Government Act of 1978, as amended, 28 U.S.C. §591 *et seq.* (1988).

In the extreme case, Congress can repair to its authority under Article I, Section 3 of the Constitution to bring impeachment proceedings against an overreaching President. In fact, with reference to the very administration at issue in this case, Congress did just that.

In short, the allocation of political questions to the political branches is not inconsistent with out constitutional tradition of limited government and balance of powers. It is precisely consistent, for it embodies limits and balances between the political branches without the intrusion of the courts into areas beyond our proper authority and expertise.

IV. Conclusion

For the reasons set forth above, we affirm the judgment of the District Court dismissing this action for want of jurisdiction pursuant to Rule 12(b)(1).

So ordered.

APPENDIX B

[Filed June 28, 2005]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2004

No. 04-5199

RENÉ SCHNEIDER, ET AL.,

APPELLANTS

v.

HENRY ALFRED KISSINGER AND
UNITED STATES OF AMERICA,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 01cv01902)

Before: SENTELLE, HENDERSON and ROGERS, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

MANDATE
Pursuant to the provisions
of Fed. R. App.Pro.41(a)

ISSUED: 9 28 05
BY: [Illegible], Deputy Clerk
ATTACHED: ___ Amending Order
___ Opinion
___ Order on Costs

Date: June 28, 2005

Opinion for the court filed by Circuit Judge Sentelle.

APPENDIX C

[Filed March 30, 2004]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. CIV.A. 01-1902 (RMC).

RENÉ SCHNEIDER, *et al.*,

Plaintiffs,

v.

HENRY A. KISSINGER, *et al.*,

Defendants.

March 30, 2004.

Michael E. Tigar, Washington, DC, for Plaintiffs.

Richard Montague, U.S. Department of Justice, Washington, DC, for Defendants.

MEMORANDUM OPINION

COLLYER, District Judge.

This lawsuit challenges covert actions allegedly directed by high-level United States officials in connection with an attempted coup in Chile in 1970 designed to prevent the election of Dr. Salvadore Allende as Chile's first

Socialist President.[1] General René Schneider, then Commander-in-Chief of the Chilean Army, opposed military intervention in the electoral process. As a result, the United States allegedly plotted with Chilean nationals to neutralize him. General Schneider was shot during a failed kidnaping attempt on October 22, 1970, and died from his wounds a few days later. Two of General Schneider's children and his Personal Representative, suing on behalf of his estate, seek to hold the United States and Henry A. Kissinger, former Assistant for National Security Affairs to President Richard M. Nixon, responsible for the General's death.

Pending before the Court are the defendants' motion to dismiss and renewed motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.[2] The plaintiffs oppose these motions and also move to strike the United States Attorney General's certification that Dr. Kissinger was acting in his official capacity when the conduct alleged in the amended complaint took place. For the following reasons, the Court concludes that this case is non-justiciable because the plain-

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[1] As explained below, Dr. Allende, the leader of Chile's leftist coalition party, won a plurality of the votes in that country's 1970 presidential election. The Chilean Congress later elected him as President. *See infra* Part I.

[2] The defendants filed a motion to dismiss on November 9, 2001, which was fully briefed. On November 12, 2002, the plaintiffs filed an amended complaint, which added a claim under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §1346 *et seq.*, and removed as a defendant Richard M. Helms, who was Director of the Central Intelligence Agency ("CIA") from 1966 to 1973. The defendants then renewed their motion to dismiss and that, too, has since been fully briefed. The parties ask the Court to consider all briefs, as they did not repeat their initial arguments in response to the amended complaint. The complaints and briefs shall be identified as I and II to distinguish them as necessary: Compl. I, Defs.' Mot. I, Pls.' Opp. I, Defs.' Reply I; Compl. II, Defs.' Mot. II, Pls.' Opp. II, Defs.' Reply II.

tiffs' claims present a political question committed to the Executive and Legislative Branches. In the alternative, the Court finds that the FTCA requires substitution of the United States for Dr. Kissinger and that the plaintiffs' allegations are barred by the doctrine of sovereign immunity. The motions to dismiss will be granted, the motion to strike will be denied, and the case will be dismissed.

I. BACKGROUND FACTS[3]

Plaintiffs René and Raúl Schneider are two of General Schneider's sons. Plaintiff José Pertierra is the Personal Representative of General Schneider's estate and is suing in that capacity. Defendant Dr. Kissinger served as National Security Advisor to former President Nixon from 1969 to 1973.[4] The United States Attorney General certified on November 2, 2001, that Dr. Kissinger was acting "within the scope of federal office or employment at the time of the incident out of which the plaintiffs' claims arose" and now seeks to substitute the United States for Dr. Kissinger as a defendant. Cert. of John Lodge Euler (attached to Defs' Mot. I).

As alleged by the plaintiffs, the following events have had a profund impact on Chile's political, social, and economic environment. On September 4, 1970, Dr. Allende won a slight plurality of the votes (36.3%) in

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[3]The facts are taken from the two complaints. Although they are "vigorously contested" by the defendants, Defs.' Mot. I at 1, the Court assumes that these facts are true for the purpose of ruling on the instant motions, which week dismissal for lack of jurisdiction and for failure to state a claim upon which relief can be granted. *See infra* Part II.

[4]Dr. Kissinger also held the position of Secretary of State from 1973 to 1977.

Chile's presidential election. Because there was no clear victor, the Constitution of Chile provided that its Congress, in joint session, would determine who would become President from the two highest contenders. The Chilean Congress traditionally had confirmed the candidate who received the greatest number of popular votes; hence, it was expected that the Congress would ratify Dr. Allende's election on October 24, 1970.

Key officials in the United States Government, including former President Nixon, wanted to prevent Dr. Allende, a self-proclaimed Marxist, from taking power.[5] On September 12, 1970, U.S. Ambassador to Chile Edward Korry advised, "[The] Chilean military will not, repeat not, move to prevent Dr. Allende's accession, barring [the] unlikely situation of national chaos and widespread violence." Compl. II ¶18 (internal quotation marks omitted). President Nixon then met with Dr. Kissinger, Mr. Helms, and Attorney General

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[5] The defendants recount some of the history of that time:

> [I]n the spring of 1970, the Soviet Union moved troops and air defense missiles into Egypt to strengthen the defense of the Suez Canal. In September, several aircraft high-jackings occurred in the Middle East. Syria invaded Jordan, where the captured aircraft and their passenger hostages had been flown. United States forces in Europe were placed on alert before the United States both prevailed upon the Soviet Union to pressure the Syrians to withdraw and successfully negotiated an end to the hostage crisis. While these events were playing out in the Middle East, information came to light that the Soviets . . . were building a submarine base in Cuba . . . [which] became public on September 25, 1970. These events . . . heightened the United States' concern over the prospect that Chile under a Marxist president might become yet another Communist base in the Western Hemisphere.

Defs.' Mot. I at 7 (citations omitted).

John Mitchell on September 15, 1970, and "ordered that the necessary steps be taken to prevent Dr. Allende from becoming President of Chile. Particularly, President Nixon instructed the CIA to 'play a direct role in organizing a military coup d'etat in Chile.' " Compl. I ¶ 18. President Nixon stated that "he was 'not concerned' about the 'risks involved[ ]' " with his decision and allocated $10 million to effect a military coup. *Id.*

The efforts to prevent Dr. Allende from assuming office allegedly proceeded on two tracks.

"Track I" comprised covert political, economic, and propaganda activities approved by the 40 Committee, a sub-cabinet level body of the Executive Branch chaired by Defendant Kissinger whose overriding purpose was to exercise control over covert operations abroad. The activities were designed to induce Dr. Allende's opponents in Chile to prevent his assumption of power, either through political or military means. "Track II" activities, in turn, were directed "towards actively promoting and encouraging the Chilean military to move against Allende."

Compl. II ¶ 19. The plaintiffs assert that only Dr. Kissinger and top CIA officials were informed of the second track. *See id.* ¶ 20. Specifically, the State Department was not informed of it. *Id.*

In October 1970, Ambassador Korry was authorized to encourage a military coup and to intensify contacts with Chilean military officers to assess their potential support. He reported to Dr. Kissinger that "General Schneider would have to be neutralized, by displacement if necessary" for any coup to be successful. *Id.* ¶ 22 (internal quotations marks omitted). Acting on this information, the CIA contacted and worked with sev-

eral coup plotters, including retired Chilean General Roberto Viaux and General Camilo Valenzuela, who was Commander of the Santiago Garrison. Within the first weeks of October, the defendants came to regard General Viaux as "the best hope for carrying out the CIA's Track II mandate." *Id.* ¶ 28 (internal quotation marks omitted). General Viaux had ties to *Patria y Libertad,* a right-wing paramilitary group in Chile. Between September 4 and October 24, 1970, the CIA provided *Patria y. Libertad* with $38,000. *Id.* ¶ 27. Around October 13, 1970, the CIA gave General Viaux $20,000 in cash and promised him a life insurance policy of $250,000. *Id.* ¶ 28. In addition, U.S. Army Attache Paul Wimert delivered to members of General Valenzuela's faction six tear gas grenades, submachine guns, and ammunition. *Id.* ¶ ¶ 36-37.

On October 14, 1970, the CIA was informed that General Viaux planned to kidnap General Schneider within 48 hours to effect the coup. The amended complaint alleges that the defendants "never gave any instruction to leave General Schneider unharmed" and that "[i] t was foreseeable . . . that the kidnaping would create a grave risk of death to General Schneider and consequent harm to his family." *Id.* ¶ 30. On October 16, 1970, the CIA ordered its operatives in Chile to "continue their work of promoting a successful coup in spite of 'other policy guidance' that they may receive from other branches of the U.S. government." *Id.* ¶ 33.

After two unsuccessful kidnaping attempts, General Schneider was fatally injured during a third attempted kidnaping by members of General Viaux's faction on October 22, 1970. He died from his gunshot wounds three days later. *Id.* at ¶ 43. General Viaux, among others, was eventually convicted by a Chilean military court on charges of kidnaping and conspiring to cause a coup.

II. LEGAL STANDARDS

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the plaintiffs bear the burden of proving by a preponderance of the evidence that the Court has subject matter jurisdiction to hear this case. *Jones v. Exec. Office of President*, 167 F.Supp.2d 10, 13 (D.D.C.-2001). In deciding such a motion, the Court must accept as true all of the factual allegations set forth in the amended complaint; however, such allegations " 'will bear closer scrutiny in resolving as 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge of the Fraternal Order of Police v. Ashcroft*, 185 F.Supp.2d 9, 13-14 (D.D.C.2001) (quoting 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE §1350). The Court may consider matters outside the pleadings. *Lipsman v. Sec'y of the Army*, No. 02-0151, 2003 U.S. Dist. LEXIS 4882, at *6 (D.D.C. Mar. 31, 2003).

A motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the amended complaint. The Court must accept as true all of the plaintiffs' well-pled factual allegations and draw all reasonable inferences in favor of the plaintiff; however, the Court does not need to accept as true any of the plaintiffs' legal conclusions. *Alexis v. District of Columbia*, 44 F.Supp.2d 331, 336-37 (D.D.C. 1999). "[An amended] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

III. ANALYSIS

The plaintiffs seek to hold the United States and Dr. Kissinger liable for the attempting kidnaping and death of General Schneider under various U.S. laws and treaties, the "law of nations";[6] Chilean law; statutes and the com-

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[6]The defendants allegedly committed torts in violation of the law of nations, as codified in the following international treaties, declarations, laws, and resolutions, including:

a) Charter of the United Nations, June 26, 1945, 59 Stat. 1031, TS 993;

b) Universal Declaration of Human Rights, G.A. Res. 217-(III), U.N. Doc. A/810 at 71 (1948);

c) Charter of the Organization of American States, 2 U.S.T. 2394, 119 U.N.T.S. 3, *as amended*, Protocol of Buenos Aires of 1967, 21 U.S.T. 607, 721 U.N.T.S. 324;

d) Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975);

e) Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, 25 I.L.M. 519;

f) American Declaration of Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L.V/II.82 doc. 6 rev. 1 at 17 (1992);

g) Inter-American Convention on the Forced Disappearance of Persons, June 9, 1993, 33 I.L.M. 1529;

h) United Nations General Assembly Resolution and Declaration on the Protection of All Persons from Enforced Disappearance, Dec. 18, 1992, 32 I.L.M. 903;

i) The Charter of the International Military Tribunal, Nuremberg, August 8, 1945, confirmed by G.A. Res. 3, U.N. Doc. A/50 (1946);

j) The Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, *reprinted in* 37 I.L.M. 999;

[footnote continued]

mon law of the District of Columbia; and, in the alternative, the FTCA. They assert nine claims in their amended complaint: summary execution; torture; cruel, inhuman, or degrading treatment; arbitrary detention; wrongful death; assault and battery; two counts of intentional infliction of emotional distress; and negligent failure to prevent summary execution, arbitrary detention, cruel, inhuman, or degrading treatment, torture, wrongful death, and assault and battery. The defendants move to dismiss, arguing that the political question doctrine renders non-justiciable all of the plaintiffs' claims; that sovereign immunity bars the claims against the United States; and that the amended complaint fails to state a cognizable claim against Dr. Kissinger, in part because of substitution under the FTCA. The plaintiffs counter that the political question doctrine is inapplicable to mere torts claims; that the United States has implicitly waived its sovereign immunity; and that Dr. Kissinger was not acting within the scope of his employment when he allegedly committed the torts at issue and is not entitled to qualified immunity.

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k) Statute for the International Criminal Tribunal for Rwanda, Nov. 8, 1994, U.N. SCOR, 49th Sess., 3453rd mtg., at 1, U.N. Doc. S/RES/955, *reprinted in* 33 I.L.M. 1598 (1994);

l) Declaration on the Elimination of Violence Against Women, G.A.[R]es. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993); and

m) Inter-American Convention on the Prevention, Punishment, & Eradication of Violence Against Women, 33 I.L.M. 1534 (in force Mar. 5, 1995).

Compl. II ¶6.

A. Political Question Doctrine

The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as "courts are fundamentally under-equipped to formulate national policies or develop standards for matters not legal in nature."

Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C.Cir. 1981) (footnote omitted), *cert. denied*, 455 U.S. 999, 102 S.Ct. 1630, 71 L.Ed.2d 865 (1982)). This is just such a case.

It is difficult to see through the lens of more than 30 years ago, when world events conspired to cause concern at the highest echelons of the United States Government that communism would spread across Latin America if Dr. Allende were elected President of Chile. Plaintiffs argue that the President of the United States directed his National Security Advisor and the CIA to assist a coup attempt in Chile to avoid a vote by Chile's Congress. They further assert that these officials carried out a covert program in furtherance of the President's directions that included an unsuccessful attempt to kidnap General Schneider and thereby caused his death. Both parties reference extended investigations by the U.S. Congress into this extraordinary activity on the part of the United States to interfere with the democratic elections of another country. With the events leading to General Schneider's death given detailed attention by the Executive and Legislative Branches, this lawsuit now asks the

Judiciary to weigh into this matter and determine whether his estate and two heirs are entitled to recompense.

The political question doctrine is "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The Supreme Court has enumerated factors that may render a case non-justiciable:

> Prominent on the surface of any case held to involve a political question is found a [1] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment of multifarious pronouncements by various departments on one question.

Id. at 217, 82 S.Ct. 691. Applying the first four factors to the plaintiffs' claims, the Court concludes that *Baker* and its progeny strongly favor dismissal of this case.[7]

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[7] The final two *Baker* factors do not affect this finding. *See id.* (Dismissal may be appropriate if only "one of these formulations is inextricable from the case at bar[.]").

1. This Lawsuit Raises Policy Questions that Are Textually Committed to a Coordinate Branch of Government.

The decision to support a coup of the Chilean Government to prevent Dr. Allende from coming to power, and the means by which the United States Government sought to effect that goal, implicate policy decisions in the murky realm of foreign affairs and national security best left to the political branches. "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative – 'the political' – Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."[8] *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 62 L.Ed. 726 (1918); *see also Comm. of United States Citizens*, 859 F.2d at 933-34 ("[F]oreign policy decisions are the subject of just such a textual commitment."). In *Baker v. Carr*, however, the Supreme Court cautioned that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. at 211, 82 S.Ct. 691. Determining whether a particular foreign affairs

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[8] The " 'classical' version" of the political question doctrine arises when the U.S. Constitution textually commits an issue to the President or Congress. *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 933 (D.C.Cir. 1988) (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 96 (2d ed. 1988)). "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a decliate exercise in constitutional interpretation." *Baker*, 369 U.S. at 211, 82 S.Ct. 691.

context presents a non-justiciable political question therefore requires a case-by-case inquiry.

The plaintiffs assert that this is a "mere tort" case that does not raise any political questions. *See* Pls.' Opp. I at 12-13. In support, they cite *Klinghoffer v. S.N.C. Achille Lauro,* 739 F.Supp. 854 (S.D.N.Y. 1990), *vacated by* 937 F.2d 44 (2d Cir. 1991), in which the Second Circuit held that the political question doctrine did not bar a lawsuit against the Palestine Liberation Organization ("PLO") for allegedly hijacking an Italian cruise liner and killing Leon Klinghoffer an American passenger.[9] The PLO argued that "issues of its liability for a terrorist attack are foreign policy questions not properly subject to judicial determination and that a court's resolution of them would infringe the foreign policy authority committed to other branches of government." *Klinghoffer,* 739 F.Supp. at 859. In rejecting that legal position, the Second Circuit determined that it was "faced with an ordinary tort suit, alleging that the defendants breached a duty of care owed to the plaintiffs or their decedents. The department to whom this issue has been 'constitutionally committed' is none other than our own – the Judiciary." *Klinghoffer,* 937 F.2d at 49.

The plaintiffs' reliance on *Klinghoffer* is misplaced. That case is readily distinguishable from the situation at

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[9] Leon Klinghoffer's widow and estate sued the owner of the Achille Laura vessel, travel agencies, and other entities, which then "impleaded the PLO, seeking indemnification or contribution for any damages awarded against them on plaintiffs' claims and compensatory and punitive damages against the PLO for tortious interference with their businesses." *Klinghoffer,* 739 F.Supp. at 857. Later, other Achille Lauro passengers filed two direct actions against the PLO.

hand. First and foremost, no policy decision by a co-equal branch of the U.S. Government was implicated in *Klinghoffer;* the relevant defendant was a foreign political organization. The plaintiffs here, in contrast, ask this Court to assess the reasonableness of the Executive Branch's decision to seek – perhaps through violent means – a change in the makeup of a foreign sovereign. Second, the PLO invoked the political question doctrine to avoid a ruling by the District Court that, it argued, would "surely exacerbate the controversy surrounding the PLO's activities." *Id.* In response, the Second Circuit noted, "The fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question." *Id.* The defendants in the instant action do not rely on the political question doctrine simply to avoid debate around the world; they base their arguments on the more legitimate premise that a decision here might entail the Judiciary's potential encroachment on the President's foreign policy determinations.

The analysis in *Chaser Shipping Corp. v. United States,* 649 F.Supp. 736, 739 (S.D.N.Y. 1986), *aff'd,* 819 F.2d 1129 (2dCir.1987), *cert. denied,* 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988), *rehrg. denied,* 487 U.S. 1243, 108 S.Ct. 2921, 101 L.Ed.2d 952 (1988), another case from the Second Circuit, is more applicable to this lawsuit. In *Chaser Shipping,* the Second Circuit affirmed the dismissal, on political question grounds, of tort claims brought by a foreign shipping company against the United States for the alleged failure to use due care in conducting mining operations in a Nicaraguan harbor. The United States District Court for the Southern District of New York concluded:

> For the judiciary to monitor the conduct of covert military operations, whether before or after their occurrence, would be an exercise of nonjudicial discretion which *Baker* counsels the courts to avoid. Such scrutiny by the judicial branch would also fail to accord appropriate respect to a coordinate branch of the Government. To avoid becoming embroiled in sensitive foreign policy matters such as this one, the Court declines to interpose its own will above the will of the President or the Congress.

Id. at 739 (citations omitted).

The plaintiffs contend that the foreign policy of the United States is not at issue because "the events complained of do not relate to a decision regarding the 'recognition of foreign governments,' or a 'President's decision to deploy military force against a foreign government[.]' " Pls.' Opp. I at 13 (citations to the defendants' brief omitted). According to the plaintiffs, they "do not ask this Court to 'decide that an Allende government would have been better or worse for the United States' interests.' . . . Rather, Plaintiffs seek only a vindication of personal rights." *Id.* This argument begs the question. The legality or propriety of the defendants' actions in allegedly supporting the attempted kidnaping and resulting death of General Schneider – *i.e.*, whether such conduct were reasonable or *ultra vires* – can be ascertained only by an examination of the genesis of U.S. foreign policy in 1970 and the President's decisions on how to implement it. For better or worse, the plaintiffs' claims arise within the context of the United States's conduct of its foreign relations. Second-guessing the methods by which the Executive Branch chose to deal with a new Socialist regime in Chile in the 1970s *vis a vis* their

effect on foreign citizens is not the proper role of this Court.[10]

Indeed, the plaintiffs' tort allegations go to the very heart of the political question doctrine: foreign policy directives from the President himself. *See* Compl. I ¶ 18. A government was poised to assume power in Chile that the President deemed inimical to the interests of the United States. Whether Executive Branch judgments at that time were correct or wise is not the issue. The question is whether the discretion to make such decisions and give directions lies solely within the political branches of Government or is subject to review by the

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[10]The plaintiffs cite *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 933-35 (D.C.Cir. 1988), for the proposition that "vindication of personal rights" is not barred by the political question doctrine. Pls.' Opp. I at 13. While that may be true in other circumstances, it does not pertain to the instant case. In *Committee of United States Citizens*, a group of U.S. citizens living in Nicaragua advanced Fifth Amendment claims challenging the United States' support of military actions by the so-called "Contras." The D.C. Circuit declined to employ the political question doctrine to dismiss their claims, stating that "the Supreme Court has repeatedly found that claims based on [due process] rights are justiciable, even if they implicate foreign policy decisions." *Comm. of United States Citizens*, 859 F.2d at 935. "It is well established[, however,] that certain constitutonal protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.-2d 653 (2001); *see also Johnson v. Eisentrager*, 339 U.S. 763, 784-85, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (Fifth Amendment protections do not extend to aliens outside the territory of the United States). Because General Schneider and his heirs were, and are, foreign citizens in Chile, there is little worry that applying the political question doctrine here would " 'give the Executive *carte blanche* to trample the most fundamental liberty and property rights of *this country's* citizenry.' " *Comm. of United States Citizens*, 859 F.2d at 935 (quoting *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1515 (D.C.Cir.1984)) (emphasis added).

Judiciary.[11] Foreign affairs do not encompass only "United States policy *in general*" toward another country, Pls.' Opp. I at 15 (emphasis added), but also cover discrete choices made by the Executive and Legislative Branches concerning the full range of relationship issues between nations, not the least of which are the leadership and economic/social policies of a fellow country in the western hemisphere.

For these reasons, the first *Baker* factor militates toward a finding that this case is barred by the political question doctrine.

2. There Exist No Judicially Discoverable and Manageable Standards to Determine the Propriety of Executive Actions Involving Foreign Relations Decisions.

Continuing with their theory that this lawsuit presents "mere torts," the plaintiffs argue that clear standards exist for resolving this matter. Pls.' Opp. I at 12. They

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[11] The plaintiffs assert that "Defendants willfully and wrongly excluded the Legislative branch from the process and therefore removed such action from the proper scope of their authority." Pls.' Opp. I at 14. However, both the Executive and Legislative Branches need not concur on a course of action for it to constitute a matter of foreign relations. These (foreign) plaintiffs do not appear to have standing to sue Executive Branch officials on behalf of a Legislature that was allegedly "misled and denied its proper role of involvement and oversight[.]" *Id.* at 15. If President Nixon and Dr. Kissinger offended the sensibilities of the U.S. Congress by engaging in covert activities to prevent Dr. Allende from serving as Chile's President, it was up to the Congress to investigate – as it did – and to determine its further response, if any. *See generally Crockett v. Reagan*, 720 F.2d 1355, 1356 (D.C.Cir.1983) (affirming the "dismissal of a suit brought by 29 Members of Congress against President Reagan and other United States officials, challenging the legality of the United States' presence in, and military assistance to, El Salvador").

claim that "the standards for evaluating wrongful death are well-established" under D.C.Code § 16-2701, and that the "Court need not depart from these in managing the instant action." *Id.* at 15. Without examining the specific elements of wrongful death, the surface of the amended complaint reveals that resolution of this case would require the Court to decide whether Dr. Kissinger's alleged decision to support the kidnaping of General Schneider in order to prevent Dr. Allende from gaining control of the Chilean Government was "wrongful." This alone would call for a determination of whether it was proper for an Executive Branch official, without regard to potential adverse consequences, to support covert actions against an undesirable figure who was set to take power in a foreign nation. Neither the D.C.Code nor the common law on wrongful death provides judicially manageable standards with which to make this policy call.

Several courts have come to a similar conclusion regarding torts allegedly committed by U.S. officials against foreigners outside the United States. *See, e.g., Industria Panificadora, S.A. v. United States,* 763 F.Supp. 1154 (D.D.C. 1991), *aff'd on other grounds,* 957 F.2d 886, 887 (D.C.Cir.1992); *Chaser Shipping Corp. v. United States,* 649 F.Supp. 736 (S.D.N.Y. 1986); *Sanchez-Espinoza v. Reagan,* 568 F.Supp. 596 (D.D.C.-1983), *aff'd on other grounds,* 770 F.2d 202, 206 (D.C.-Cir. 1985).[12] The District Court in *Industria Panifica-*

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[12]The D.C. Circuit declined to rule on the applicability of the political question doctrine in both *Industria Panificadora* and *Sanchez-Espinoza.* In each instance, the Court of Appeals found an alternative basis for sustaining the trial court's decision, while not specifically disavowing non-justiciability. *See Industria Panificadora, S.A.*, 957 F.2d at 887 ("[W]e need not and do not decide whether the 'political question' doctrine supplies an alternative

[footnote continued]

dora held that it lacked judicially manageable standards to decide whether the United States was negligent for failing to leave a sufficient police power in Panama after the U.S. Armed Forces ousted General Manuel Noriega. 763 F.Supp. at 1161 ("[W]hile plaintiffs carefully worded their amended complaint to suggest a basis in traditional tort concepts of due care and negligence, their allegations implicate broader political questions that encompass U.S. foreign policy and military operations."). "Such an inquiry would be fraught with national security considerations and unmanageable political and military issues." *Id.* Similarly, the District Court in *Chaser Shipping* "simply [did] not agree with plaintiffs that an inquiry into the issues of tort liability raised by their complaint would be a manageable one" because the claims turned on whether the President and CIA had exercised due care in conducting covert military operations in Nicaragua. 649 F.Supp. at 738. In *Sanchez-Espinoza*, the District Court dismissed on political question grounds claims against the U.S. Government for allegedly supporting paramilitary activities in an effort to overthrow the Nicaraguan Government. 568 F.Supp. at 602. "[T]he questions presented [in that case] require[d] judicial inquiry into sensitive military matters . . . [such as] covert activities of CIA operatives in Nicaragua and Honduras[.]" *Id.* at 600.

Resolving the present lawsuit would compel the Court, at a minimum, to determine whether actions or omis-

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ground for dismissal of the case."); *Sanchez-Espinoza*, 770 F.2d at 206 ("Without necessarily disapproving the District Court's conclusion that all aspects of the present case present a nonjusticiable political question, we choose not to resort to that doctrine for most of the claims."). While recognizing the caution of the D.C. Circuit in applying the political question doctrine, the Court nonetheless finds the reasoning of these District Judges persuasive.

sions by an Executive Branch officer in the area of foreign relations and national security were "wrongful" under tort law. To gauge the reasonableness of these foreign policy decisions, the Court would have to measure and balance a myriad of thorny foreign and domestic political considerations, *i.e.*, the magnitude of any threat to the United States and its democratic allies from the spread of Marxism to Chile. The Court lacks judicially discoverable and manageable standards to resolve these inherently political questions. Under the second *Baker* factor, this case should be dismissed as non-justiciable.

3. Judicial Resolution Would Require Evaluation of an Initial Policy Determination of a Kind Clearly For Nonjudicial Discretion.

The plaintiffs complain that Dr. Kissinger worked with the CIA to provide material aid to violent coup plotters without regard to the foreseeable impact on the safety and life of General Schneider. They allege that Dr. Kissinger breached a duty to give explicit directions that General Schneider's well-being be protected. However, the Executive Branch's alleged decision to support the kidnaping of General Schneider, in the face of a growing leftist regime in Chile, plainly required one or more initial policy determinations beyond the pale of judicial expertise.

The Supreme Court has emphasized that "the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court.' " *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) (quoting *Container Corp. of Am. v.*

Franchise Tax Bd., 463 U.S. 159, 196, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983)). In response, the plaintiffs contend that "the Court is not here asked to pass judgment on any perceived value or danger of the Allende government to United States interests and need not make any policy determination[.]" Pls.' Opp. I at 15. While the plaintiffs are correct that the Court might be able to avoid evaluating the merits of a potential Allende Government in 1970, it would nonetheless be forced to pass judgment on the means used by the United States to keep that government from taking power. In so doing, the Court would naturally have to consider whether preventing Dr. Allende from becoming President of Chile was worth supporting a rebel military faction that would likely commit human rights violations. The Hinchey Report to the Congress, quoted by the plaintiffs, illustrates some of the foreign policy implications:

> There is no doubt that some CIA contacts were actively engaged in committing and covering up serious human rights abuses.
>
> As a result of lessons learned in Chile, Central America and elsewhere, the CIA now carefully reviews all contacts for potential involvement in human rights abuses and *makes a deliberate decision balancing the nature and severity of the human rights abuses against the potential intelligence value of continuing the relationship.* These standards, established in the mid-1990s, would likely have altered the amount of contact we had with perpetrators of human rights violators in Chile had they been in effect at that time.

Report on CIA Activities in Chile, September 18, 2000, *available at* http://www.foia.state.gov/Reports/Hinchey-Report.asp (emphasis added). Courts are decidedly

ill-equipped to consider such questions as they are not privy to all relevant intelligence information, and they have no appropriate legal standard to determine the gravity of the threat to the United States that might be caused by a (hostile) foreign government or the likelihood that certain covert actions would ameliorate or exacerbate that threat.

Ruling on the propriety of relying on certain Chilean dissidents to kidnap General Schneider would require an initial policy determination of a kind that does not lie within judicial discretion. This third *Baker* factor therefore counsels against the Court hearing this case.

4. The Court Could Not Proceed Without Expressing A Lack of Respect to Coordinate Branches of Government.

It would be virtually impossible for the Court to resolve this case without either condemning officials of the Executive Branch for their actions or undermining the conclusions reached by Congress in the Hinchey Report. A court should refrain from entertaining a suit if it would be unable to do so without expressing lack of respect due to its co-equal Branches of Government. *See Baker v. Carr,* 369 U.S. at 217, 82 S.Ct. 691; *Chaser,* 649 F.Supp. at 739; *Sanchez-Espinoza,* 568 F.Supp. at 600. In this circumstance, the Executive Branch participated in covert activities that the Congress later investigated. It is not realistically possible for the Judiciary to add its voice or its opinion without contradiction to either or both of these other Branches. Accordingly, the fourth *Baker* factor also leans toward dismissal.

B. Immunity.[13]

Both defendants claim immunity as an additional basis for dismissal. As an initial matter, the Court agrees with the U.S. Attorney General that Dr. Kissinger was acting within the scope of his employment for purposes of this lawsuit; accordingly, the United States will be substituted for him as the sole defendant except for claims under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. §1350 note. These TVPA claims are deficient, however, and will be dismissed for failure to state a claim upon which relief can be granted. The remaining case against the United States will be dismissed based on its sovereign immunity.

1. The United States Was Properly Substituted for Dr. Kissinger under the Westfall Act.

The Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Westfall Act"), Pub.L. No. 100-694, 102 Stat. 4563 (codified in part at 28 U.S.C. §§2671, 2674, 2679), confers immunity on federal officials "by making an FTCA action against the Government the exclusive remedy for torts committed by [such] employees in the scope of their employment." *United Statez v. Smith*, 499 U.S. 160, 163, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991); *see also* 28 U.S.C. §2679(b)(1).

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[13]Having determined that the plaintiffs' claims present a non-justiciable political question, the Court would normally end its decision. However, alternative bases exist to dismiss this case and the D.C. Circuit has previously avoided reliance on the political question doctrine. The Court will address alternative bases for dismissal should appellate review be sought.

> When a federal employee is sued for a wrongful or *negligent act, the [Westfall Act] empowers the* Attorney General to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose . . . ." 28 U.S.C. §2679(d)(1). Upon certification, the employee is dismissed from the action and the United States is substituted as defendant.

Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 419, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995). This certification is not conclusive and a federal court examines the issue independently. *Id.* at 434, 115 S.Ct. 2227. In general, the plaintiffs bear the burden of producing evidence that a defendant was acting outside the scope of his employment.[14] *See Kimbro v. Velten*, 30 F.3d 1501, 1509 (D.C.Cir.1994); *Wright v. United States*, No. 95-0274, 1996 U.S. Dist. LEXIS 21781, at *8 (D.D.C. Feb. 8, 1996).

The plaintiffs move to strike the U.S. Attorney General's certification that Dr. Kissinger was acting within the scope of his employment. They assert that, "because Defendants' conduct constitutes a clear violation of peremptory norms of international law, such that can never be within the scope of employment, the certification by Defendant United States is improper." Pls.' Opp. I at 5. This statement, however, is based on an erroneous interpretation of the term "scope of employment."

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[14] Given that the Court accepts as true the plaintiffs' *factual* assertions regarding the parameters of Dr. Kissinger's job role and duties, there is no need for an evidentiary hearing to resolve this legal issue. *See Stokes v. Cross*, 327 F.3d 1210, 1216 (D.C.Cir.-2003) ("Not every complaint will warrant further inquiry into the scope-of-employment issue.").

The scope of employment of a federal employee is governed by state law. *See Haddon v. United States*, 68 F.3d 1420, 1423 (D.C.Cir.1995) (citing *Kimbro*, 30 F.3d at 1506). On this issue, the District of Columbia looks to the Restatement (Second) of Agency, which provides:

> [c]onduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Restatement (Second) of Agency §228(1). Conduct must be "of the same general nature as that authorized" or "incidental to the conduct authorized" to be within the scope of employment. *Id.* §229. For conduct to be "incidental" it must be foreseeable, meaning that it is a "direct outgrowth" of the performance of an employee's instructions or job assignment. *See Haddon*, 68 F.3d at 1424.

The plaintiffs' theory that a violation of international law always falls outside the scope of a federal official's employment misconstrues "the scope" of this term. It is well settled that an employee is capable of committing a variety of illegal or tortious acts for which his employer may be held liable, even though the employer did not hire him for that purpose. This is, after all, the predicate of *respondeat superior* liability. *See, e.g., Weinberg v. Johnson*, 518 A.2d 985, 988 (D.C.1986) ("The doctrine of *respondeat superior* is a doctrine of vicarious liability which imposes liability on employers for the torts committed by their employees within the scope of their

employment.").[15] Defining an employee's scope of employment is not a judgment about whether alleged conduct is deleterious or actionable; rather, this procedure merely determines *who* may be held liable for that conduct, an employee or his boss.[16]

The Court finds that Dr. Kissinger was acting within the scope of his employment as National Security Advisor to President Nixon when he allegedly conspired to kidnap General Schneider. The establishment of a Socialist Government in Chile would have had a substantive impact on U.S. foreign policy and would naturally implicate national security concerns for which Dr. Kissinger had some responsibility. Moreover, there is no allegation by the plaintiffs that Dr. Kissinger undertook these activities solely, if at all, for his own personal benefit. *Id.* at 990 ("The tort must be actuated, at least in part, by a purpose to further the master's business and not be unexpected in view of the servant's duties."). Indeed, the plaintiffs themselves initially averred that "President Nixon met with Defendant Kissinger . . . and *ordered* that the necessary steps be taken to prevent Dr. Allende from becoming President of Chile."[17] Compl. I ¶ 18

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[15] *Weinberg* is a prime example of the breadth of the term "scope of employment." In that case, the D.C. Court of Appeals sustained a jury verdict against the owners of a laundromat when an employee shot a patron in the face following an argument about missing shirts. The Court of Appeals held that, as a matter of law, a reasonable jury could conclude that the employee "was acting within the scope of his employment" when he committed the shooting. *Id.*

[16] In cases where the United States is the employer, substitution under the Westfall Act may have the practical effect of rendering tort claims unredressable because of sovereign immunity.

[17] The filing of the amended complaint, which omits specific references to President Nixon that were detailed in the first complaint, does not excise those allegations from history or this record.

(emphasis added). The plaintiffs further stated in their first complaint that "President Nixon instructed the CIA to 'play a direct role in organizing a military coup d'etat in Chile' and to do quickly whatever could be done to prevent Dr. Allende from being seated." *Id.* Clearly, then, the conduct attributed to Dr. Kissinger occurred during the performance of his job function and, as conceded, at the express direction of the President.

Ordinarily, a ruling that Dr. Kissinger was acting within the scope of his employment would result in his dismissal from the case in favor of the United States. Immunity under the Westfall Act, however, does not apply to a civil action against a federal employee "which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. §2679(b)(2)(B). The plaintiffs argue that their claims under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. §1350, international law, and the TVPA fall within this exception.

Pursuant to the ATCA, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.* The plaintiffs assert that this statute establishes "both a private cause of action and a federal forum where aliens may seek redress for violations of international law."[18] Pls.' Opp. I at 24. The defendants counter that the ATCA creates no

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[18] Whether the ATCA really does provide a cause of action is unclear in this Circuit. *Compare Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777-82 (D.C.Cir.1984) (Edwards, J., concurring), *and Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980), *with Al Odah v. United States*, 321 F.3d 1134, 1146-47 (D.C.Cir.-2003) (Randolph, J., concurring), *and Tel-Oren*, 726 F.2d at 801 (Bork, J., concurring).

substantive rights or duties that can be "violated" for purposes of the Westfall Act; rather "§1350 contemplates that the district courts can entertain an action for the violation of substantive rights conferred elsewhere, namely by the law of nations or by a treaty of the United States." Def.' Mot. I at 25 (citing *Alvarez-Machain v. United States*, 266 F.3d 1045, 1053-54 (9th Cir. 2001)).

In *Alvarez-Machain*, a Mexican doctor sued individual agents of the United States Drug Enforcement Agency ("DEA"), among others, for "(1) kidnaping, (2) torture, (e) cruel and inhuman and degrading treatment or punishment, (4) arbitrary detention, (5) assault and battery, (6) false imprisonment, (7) intentional infliction of emotional distress, (8) false arrest, (9) negligent employment, (10) negligent infliction of emotional distress, and (11) various constitutional torts" after he was abducted from Mexico to stand trial in the United States. 266 F.3d at 1049. A three-judge panel on the Ninth Circuit affirmed the District Court's ruling that

> an action under the ATCA was not exempt from the exclusive remedy provision of the Liability Reform Act. [The District Court] reasoned that "it is international law, not the ATCA," that gives individuals fundamental rights. Therefore, a claim under the ATCA is based on a violation of international law, not of the ATCA itself.

Id. at 1053 (citing *United States v. Smith*, 499 U.S. 160, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991)).[19] This Court

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[19]The Ninth Circuit sitting *en banc* later adopted this analysis. *Alvarez-Machain v. United States*, 331 F.3d 604, 631-32 (9th Cir. 2003) (en banc) ("[W]e agree with the three-judge panel's conclusion that the exemption does not apply here, and that the

[footnote continued]

agrees with the Ninth Circuit's logic and concludes that the ATCA itself cannot be violated for purposes of §2679(b)(2)(B).

The plaintiffs also fail to defeat substitution on the grounds that "violations of international law 'arise under' the laws of the United States for purposes of jurisdiction under 28 U.S.C. §1331." Pls.' Opp. I at 25. The Westfall Act explicitly makes an exception for "a violation of a statute of the United States[,]" not federal common law or the law of nations. 28 U.S.C. §2679(b)(2)(B). Even if "[s]ection 1331 provides an independent basis for subject-matter jurisdiction over all claims alleging violations of international law, relying on the settled proposition that federal common law incorporates international law[,]" Pls.' Opp. I at 25-26, it cannot possibly be said that the plaintiffs bring suit for a violation of §1331, which merely provides federal question jurisdiction and not a cause of action.

In contrast, a violation of the TVPA arguably fulfills the requirements of §2679(b)(2)(B). *See* Defs.' Mot. I at 23. Even so, this statute provides no relief against Dr. Kissinger. The TVPA imposes civil liability only on an individual acting "under actual or apparent authority, or color of law, of any *foreign* nation." TVPA §2(a) (emphasis added). In carrying out the direct orders of the President of the United States, *see* Compl. I ¶18, Dr. Kissinger was most assuredly acting pursuant to U.S. law, if any, despite the fact that his alleged foreign coconspirators may have been acting under color of Chilean law. In addition, the TVPA claims appear to be barred

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United States was properly substituted for the individual DEA agents."), *cert. granted*, ___ U.S. ___, 124 S.Ct. 821, 157 L.Ed.2d 692 (2003).

by Dr. Kissinger's qualified immunity from suit. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) ("[G]overnment officials performing discretionary functions[ ] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). Since the TVPA was passed almost twenty-two years after the events in question, its proscriptions could not have been an accepted basis for personal liability in 1970. Given this result, the Court does not need to determine whether Dr. Kissinger is entitled to absolute immunity as a senior White House aide "entrusted with discretionary authority in such sensitive areas as national security or foreign policy," an argument advanced by the defendants.[20] *Id.* at 812, 102 S.Ct. 2727.

2. The Doctrine of Sovereign Immunity Bars Claims against the United States.

"It is well established that 'the United States, as sovereign, is immune from suit save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the

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[20] In *Halperin v. Kissinger,* a case involving a warrantless wiretap of private telephones in the name of national security, the D.C. Circuit suggested that the National Security Advisor will rarely, if ever, be entitled to absolute immunity. 807 F.2d 180 (D.C.Cir. 1986) ("If performance of a national security *function* does not entitle the Attorney General to absolute immunity, then the fact that the National Security Advisor's '*entire* function is defined by the interrelated concepts of national security and foreign policy,' can hardly justify the conferral of absolute immunity upon that office as such[.]") (citation omitted).

suit.' " *In re Sealed Case No. 99-3091,* 192 F.3d 995, 999 (D.C.Cir.1999) (quoting *United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941))). Any waiver of sovereign immunity must be unequivocally expressed and "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena,* 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996); *see also Floyd v. District of Columbia,* 129 F.3d 152, 156 (D.C.Cir.1997) ("[W]aivers of sovereign immunity must be unequivocally expressed in statutory text; we cannot imply a waiver of sovereign immunity[.]").

Based on the allegations in their first complaint, the plaintiffs assert that the United States does not enjoy sovereign immunity from this lawsuit because "[t]he acts complained of are violations of peremptory norms of international law as to which no person or state may claim immunity; and . . . principles of comity demand the waiver of sovereign immunity of the United States under those same limited exceptions" provided in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§1330, 1602-11, against other nations. Pls.' Opp. 1 at 39. These arguments misunderstand the nature of sovereign immunity. "[A]n implied waiver [of sovereign immunity] depends upon the . . . government's having at some point indicated its amenability to suit." *Princz v. Fed. Republic of Germany,* 26 F.3d 1166, 1174 (D.C. Cir. 1994). *Princz* held that "the violation of *jus cogens* norms by the Third Reich [did not] constitute[ ] an implied waiver of [Germany's] sovereign immunity under the FSIA."[21] *Id.; see also Hwang Geum Joo v.*

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[21] "Plaintiffs understand that this court is bound by [*Princz*] and in part present a good faith argument for a change in law." Pls.' Opp. 1 at 39.

Japan, 332 F.3d 679, 680 (D.C.Cir.2003) ("We reject the appellants' argument that violation of a *jus cogens* norm constitutes a waiver of sovereign immunity."). Thus, not only does precedent instruct that a waiver of sovereign immunity must be explicit but it also teaches that such immunity cannot be implied unless a government has "indicated its amendability to suit" even for the most heinous of crimes against international law. *See Princz*, 26 F.3d at 1168 (atrocities during the Holocaust); *Hwang Geum Joo*, 332 F.3d at 680 (sex slaves for Japanese soldiers). The initial complaint – while alleging violations of the law of nations – therefore provides no grounds on which the Court may find that the United States has consented to be sued here.[22]

The amended complaint added claims against the United States under the FTCA, which "grants federal district courts jurisdiction over claims arising from certain torts committed by federal employees in the scope of their employment, and waives the government's sovereign immunity from such claims." *Sloan v. HUD*, 236 F.3d 756, 759 (D.C.Cir.2001) (citing 28 U.S.C. §§1346(b), 2674). Prior to filing suit under the FTCA, however, a putative claimant must exhaust an administrative process:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, un-

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[22]The ATCA also does not contain a waiver of sovereign immunity. *Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 887 (D.C.Cir.1992).

> less the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant anytime thereafter, be deemed a final denial of the claim for purposes of this section.

28 U.S.C. §2675(a); *see also McNeil v. United States*, 508 U.S. 106, 113, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993) ("The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies."). According to the initial complaint, "[a]s to . . . any claims for which Plaintiffs are required to exhaust administrative remedies prior to suit, Plaintiffs have made the appropriate administrative filings, and will amend this complaint when those are resolved." Compl. I ¶3. The amended complaint includes an eighth claim for relief under the FTCA, described as "[n]egligent failure to prevent summary execution, arbitrary detention, cruel, inhuman or degrading treatment, torture, wrongful death and assault and battery[,]" as well as an additional count for intentional infliction of emotional distress. Compl. II at 22-23. The plaintiffs assert that their FTCA claims "were presented to the Department of State and Central Intelligence Agency" and that they "have exhausted administrative remedies[.]" *Id.* ¶; *see also* Pls.' Opp. II at 3 ("Plaintiffs waited six months, as required by §2675(a), for formal disposition of these claims before filing the Amended Complaint that includes claims based upon the FTCA."). The plaintiffs argue that *McNeil* is inapplicable because, unlike the plaintiff in that case, their initial complaint was not based upon FTCA jurisdiction. Pls.' Opp. at 4.

The question presented is not, as the plaintiffs suggest, whether the initial complaint was explicitly based on FTCA jurisdiction but whether that pleading advanced claims against the United States for money damages for injury "caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment . . . ." 28 U.S.C. §2675(a). The initial complaint sued the United States for damages based on orders allegedly given by former President Nixon to prevent Dr. Allende from serving as President in Chile.[23] *See* Compl. I ¶ 18. While the former President is not a named defendant,[24] the basis for this lawsuit, as initially pled, lay with his directions to Dr. Kissinger and Mr. Helms as the predicate wrongful acts.[25] Therefore, the initial complaint met the definition of the FTCA for "a claim against the United States" under §2675(a); it was necessary for the plaintiffs to complete the administrative process before coming to court. *See McNeil*, 508 U.S. at 113, 113 S.Ct. 1980.

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[23]The initial complaint specifically named the United States as a defendant and also set forth an argument that the United States had waived its sovereign immunity. The Court would be more inclined to rule that the initial complaint did not allege claims subject to §2675 if the United States had not been included as a defendant therein.

[24]*See Nixon v. Fitzgerald*, 457 U.S. 731, 756, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982) ("[W]e think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility.").

[25]The Court has already determined that Dr. Kissinger was acting within the scope of his employment. *See supra* Part III.B.1. Further, the plaintiffs acknowledge that Dr. Kissinger and Mr. Helms "were Executive Branch employees and that their acts touched upon foreign relations[.]" Pls.' Opp. I at 14.

"Allowing claimants generally to bring suit under the FTCA before exhausting their administrative remedies and to cure the jurisdictional defect by filing an amended complaint would render the exhaustion requirement meaningless and impose an unnecessary burden on the judicial system." *Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir.1999).[26] The United States is immune from suit except to the extent – *i.e.*, the exact manner in which – it consents. Any waiver of sovereign immunity expressed in the FTCA is unavailable to the plaintiffs in *this* case.[27]

IV. CONCLUSION

The plaintiffs' claims present a non-justiciable political question on foreign policy decisions undertaken by the Executive Branch in 1970. The plaintiffs' remedy, if any, must be found in the Congress. In the alternative, the Court finds that Dr. Kissinger was properly certified as acting within the scope of his employment *vis-a-vis* the relevant events. The United States will be substituted

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[26] Because the Government expressly agreed in *Duplan* that the amended complaint could be treated as starting a new lawsuit, the Tenth Circuit did not rule on this basis.

[27] The plaintiffs assert in their second opposition brief that they also seek a declaratory judgment against the United States, in addition to money damages. Although the amended complaint rests jurisdiction in part on the Administrative Procedure Act, 5 U.S.C. §702, none of the Claims for Relief appears to request a judicial declaration and the Prayer for Relief does not mention a declaratory judgment. Both of these sections, however, refer to compensatory and punitive damages. In any event, because the claims here concern foreign and national security policy directives of the President, the Court believes that issuing discretionary equitable relief would be particularly inappropriate.

for him as the sole defendant. With this substitution, the amended complaint is barred by the doctrine of sovereign immunity. Both of the defendants' motions to dismiss will be granted. A separate order accompanies this memorandum opinion.

ORDER

For the reasons stated in the memorandum opinion that accompanies this order, it is hereby

ORDERED that the defendants' two motions to dismiss are **GRANTED.** It is

FURTHER ORDERED that the plaintiffs' motion to strike is **DENIED.** The United States is substituted for Defendant Henry A. Kissinger. It is

FURTHER ORDERED that this case is **DISMISSED.** It is

FURTHER ORDERED that this is a final appealable order. *See* FED. R. APP. P. 4(a).

SO ORDERED.

APPENDIX D

[Filed March 30, 2004]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-1902 (RMC)

RENÉ SCHNEIDER, *et al.*,

Plaintiffs,

v.

HENRY A. KISSINGER, *et al.*,

Defendants.

ORDER

For the reasons stated in the memorandum opinion that accompanies this order, it is hereby

ORDERED that the defendants. two motions to dismiss are GRANTED. It is

FURTHER ORDERED that the plaintiffs' motion to strike is DENIED. The United States is substituted for Defendant Henry A. Kissinger. It is

FURTHER ORDERED that this case is DISMISSED. It is

FURTHER ORDERED that this is a final appealable order. *See* FED R. APP. P. 4(a).

SO ORDERED.

/s/
ROSEMARY M. COLLYER
United States District Judge

DATE: March 30, 2004

APPENDIX E

[Filed September 9, 2005]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 2005

No. 04-5199

01cv01902

RENÉ SCHNEIDER, et al.,

Appellants

v.

HENRY ALFRED KISSINGER and
UNITED STATES OF AMERICA,

Appellees

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Roberts,* Brown and Griffith, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

*Circuit Judge Roberts did not participate in this matter.

APPENDIX F

[Filed September 9, 2005]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2005

No. 04-5199
01cv01902

RENÉ SCHNEIDER, et al.,

Appellants

v.

HENRY ALFRED KISSINGER and
UNITED STATES OF AMERICA,

Appellees

BEFORE: Sentelle, Henderson, and Rogers, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed August 11, 2005, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

(2)

No. 05-743

In the Supreme Court of the United States

RENÉ SCHNEIDER, ET AL., PETITIONERS

v.

HENRY KISSINGER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
GREGORY G. KATSAS
Acting Assistant Attorney General
ROBERT M. LOEB
MARK R. FREEMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioners' tort claims, based on the United States' alleged involvement in covert activities in Chile during the 1970s, are not justiciable.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Miscellaneous: Page

In the Supreme Court of the United States

No. 05-743

RENÉ SCHNEIDER, ET AL., PETITIONERS

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 412 F.3d 190. The memorandum opinion of the district court (Pet. App. 24a-59a) is reported at 310 F. Supp. 2d 251.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2005. A petition for rehearing was denied on September 9, 2005 (Pet. App. 62a-65a). The petition for a writ of certiorari was filed on December 8, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the United States' alleged involvement in covert activities in Chile during the 1970s,

and, in particular, in the death of General René Schneider, the commander-in-chief of the Chilean army. Petitioners are René and Raúl Schneider, General Schneider's surviving sons, and José Pertierra, the personal representative of General Schneider's estate. Respondents are the United States and Dr. Henry Kissinger, who served as National Security Advisor to President Nixon during the events at issue. Petitioners filed suit against respondents in the United States District Court for the District of Columbia, alleging various tort claims arising from the death of General Schneider. The district court dismissed petitioners' claims on the ground, *inter alia*, that they presented a nonjusticiable political question, Pet. App. 24a-59a, and the court of appeals affirmed, *id.* at 1a-21a.

1. As alleged in the complaint, the facts are as follows. In September 1970, Salvador Allende, leader of the Socialist Party of Chile, won a slight plurality of the vote in Chile's presidential election. In the wake of the Chilean election, "[k]ey United States policymakers," who were opposed to the formation of a socialist government in a Latin American country, began assessing "the pros and cons and problems and prospects involved should a Chilean military coup be organized . . . with U.S. assistance." After consulting with senior officials (including National Security Advisor Kissinger), President Nixon undertook to prevent Allende from becoming president of Chile, and ordered the Central Intelligence Agency (CIA) to "play a direct role in organizing a military coup d'etat." Pet. App. 3a, 26a-28a.

As part of the efforts to prevent Allende from taking power, the United States' ambassador to Chile, Edward Korry, was authorized to make contacts with the Chilean military and to encourage a coup. Ambassador Korry

informed National Security Advisor Kissinger that "General Schneider would have to be neutralized, by displacement if necessary," if any coup were to succeed. In October 1970, the CIA learned that Chilean dissidents, to whom the CIA had provided weapons and other support, intended to kidnap General Schneider. The complaint alleges that respondents "never gave any instruction to leave General Schneider unharmed" and that "[i]t was foreseeable . . . that the kidnaping would create a grave risk of death to General Schneider and consequent harm to his family." After two unsuccessful kidnapping attempts, General Schneider was shot during a third attempt on October 22, 1970, and died of his wounds a few days later. Allende took office in November 1970 and served as president until he was deposed in 1973. Pet. App. 4a, 28a-29a.[1]

2. On September 10, 2001—more than 30 years after the alleged conduct—petitioners filed suit against respondents in the United States District Court for the District of Columbia.[2] As amended, petitioners' complaint alleged that respondents had engaged in summary execution, torture, cruel or degrading treatment, arbitrary detention, conduct resulting in wrongful death,

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[1] A Senate committee later found that, while American officials had encouraged the dissidents who attempted to kidnap General Schneider, they had withdrawn active support of the dissidents before the ultimate kidnapping attempt, and did not desire or encourage General Schneider's death. See *Alleged Assassination Plots Involving Foreign Leaders: An Interim Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S. Rep. No. 465, 94th Cong., 1st Sess. 5, 256 (1975).

[2] Petitioners also filed suit against Richard M. Helms, who served as Director of Central Intelligence during the events at issue. Petitioners dismissed their claims against Helms after he died in 2002.

assault and battery, and intentional infliction of emotional distress, in violation of federal, District of Columbia, international, and Chilean law. Pet. App. 31a-32a.

After the Attorney General certified that former National Security Advisor Kissinger was acting within the scope of his office or employment at the time of the incident out of which the claims arose, the United States sought to be substituted as defendant on petitioner's claims against Kissinger pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679(d)(1). Pet. App. 4a-5a. Respondents then moved to dismiss petitioners' claims on the grounds (1) that the district court lacked jurisdiction under the political question doctrine and (2) that petitioners had failed to state a claim because the United States, as the sole appropriate defendant, had sovereign immunity from petitioners' claims. *Id.* at 5a.

3. The district court granted respondents' motion to dismiss. Pet. App. 24a-59a.

The district court first held that it lacked jurisdiction under the political question doctrine. Pet. App. 33a-45a. The court reasoned that "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Id.* at 33a.

The district court explained that, in *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court enumerated six factors, any one of which would render a case nonjusticiable under the political question doctrine:

> [1] [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and

> manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217; see Pet. App. 33a-34a.

In this case, the district court concluded that the first four *Baker* factors were all met. Pet. App. 34a. The court reasoned that "[t]he decision to support a coup of the Chilean Government * * *, and the means by which the United States Government sought to effect that goal, implicate policy decisions in the murky realm of foreign affairs and national security best left to the political branches." *Id.* at 35a. The court rejected petitioners' argument that "this is a 'mere tort' case that does not raise any political questions." *Id.* at 36a. The court reasoned that petitioners' argument "begs the question" because "[t]he legality or propriety of [respondents'] actions in allegedly supporting the attempted kidnaping and resulting death of General Schneider * * * can be ascertained only by an examination of the genesis of U.S. foreign policy in 1970 and the President's decisions on how to implement it." *Id.* at 38a. "[Petitioners'] tort allegations," the court concluded, "go to the very heart of the political question doctrine: foreign policy directives from the President himself." *Id.* at 39a.

The district court also held, in the alternative, that petitioners had failed to state a claim because the United States, as the sole appropriate defendant, had

sovereign immunity from petitioners' claims. Pet. App. 46a-58a. The court first concluded that the United States was properly substituted for former National Security Advisor Kissinger under the Westfall Act, on the ground that "Dr. Kissinger was acting within the scope of his employment as National Security Advisor to President Nixon when he allegedly conspired to kidnap General Schneider." *Id.* at 49a. The court rejected petitioners' contention that Kissinger was not entitled to immunity under a different provision of the Westfall Act, 28 U.S.C. 2679(b)(2)(B), because petitioners had failed to identify any statute that gave rise to a substantive claim against Kissinger (with the possible exception of a claim under the Torture Victims Protection Act of 1991, 28 U.S.C. 1350 note, as to which Kissinger would have qualified immunity in any event). Pet. App. 50a-53a. The court then concluded that the United States was entitled to sovereign immunity, on the ground that petitioners had failed to identify a valid waiver of immunity. *Id.* at 55a. The court noted that petitioners had asserted a claim under the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1), but reasoned that they could not avail themselves of the waiver of immunity in that statute because they had failed to exhaust their administrative remedies. Pet. App. 55a-58a.

4. The court of appeals affirmed. Pet. App. 1a-21a. The court concluded that this case presented a nonjusticiable political question and agreed that it should be dismissed for want of jurisdiction. *Id.* at 21a.

Like the district court, the court of appeals determined that the first four factors articulated by this Court in *Baker* were all satisfied in this case. Pet. App. 8a-16a. As to the first factor ("a textually demonstrable constitutional commitment of the issue to a coordinate

political department"), the court reasoned that "there could * * * be no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Id.* at 8a. "Neither can it be gainsaid," the court added, "that the subject matter of the instant case involves the foreign policy decisions of the United States." *Id.* at 10a. As to the second factor ("a lack of judicially discoverable and manageable standards for resolving [the issue]"), the court noted that "for a court to adjudicate this case would be for that court to undertake the determination of whether, 35 years ago, at the height of the Cold War * * *, it was proper for an Executive branch official . . . to support covert actions against a committed Marxist who was set to take power in a Latin American country." *Id.* at 11a-12a (internal quotation marks and citation omitted). "The courts," the court of appeals asserted, "are * * * ill-suited to displace the political branches in such decision-making." *Ibid.*

As to the third factor ("the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"), the court of appeals reasoned that, in order to decide the case, "we would be forced to pass judgment on the policy-based decision of the executive to use covert action to prevent that government from taking power." Pet. App. 15a. The court reiterated that "[t]o determine whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking." *Ibid.* Finally, as to the fourth factor ("the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"), the court noted that, "[f]rom what we have concluded as to the first